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SUPREME COURT

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET. AL., APPELLANTS,

vs.

OLLIE McCLUNG, SR., AND OLLIE McCLUNG, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

FILED _____

Supreme Court of the United States

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No.

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET. AL., APPELLANTS,

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INDEX

	Original	Print
Record from the United States District Court for the Northern District of Alabama		
Complaint	1	1
Proposed temporary restraining order	9	9
Order convening three-judge court	10	10
Notice of hearing	11	12
Request for admissions	12	13
Notice of motion to dismiss	14	15

	Original	Print
Record from the United States District Court for the Northern District of Alabama—Continued		
Motion to dismiss the complaint	15	16
Amendment to complaint	18	18
Request for additional admissions	20	20
Response to request for admissions	23	23
Objections to plaintiffs' request for additional admissions	27	25
Notice of hearing	31	30
Affidavit of Weaver Saterbak	32	31
Additional response to request for admissions	34	32
Opinion, per curiam	36	34
Order overruling motion to dismiss	52a	50
Temporary injunction	53	51
Notice of appeal to the Supreme Court of the United States	54	52
Proceedings of September 1, 1964	58	55
Appearances	58	55
Colloquy between Court and counsel	61	56
Testimony of Ollie McClung, Sr. direct	86	70
cross	111	84
redirect	115	86
Testimony of Ollie Mc Clung, Jr.	116	87
Ollie Mc Clung, Sr., recalled	120	89
Reporter's certificate (omitted in printing)	125	91
Clerk's certificate (omitted in printing)	126	91

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR., PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

COMPLAINT—Filed July 31, 1964

Come the plaintiffs and aver as follows:

1. Plantiffs, father and son respectively, are citizens and residents of the city of Birmingham, Alabama; and are partners operating a restaurant as hereinafter alleged in said city. Defendant Robert F. Kennedy is Attorney General of the United States and as such is the person in charge of the enforcement of Public Law 88-352, 88th Congress, approved July 2, 1964 (78 Stat. 241) hereinafter referred to as the Civil Rights Act of 1964. Defendant Macon L. Weaver is United States Attorney for the Northern District of Alabama, the official representative and agent of the Attorney General of the United States within the Northern District of Alabama, and is a person whose official responsibility includes the enforcement of said Act under the direction of defendant Kennedy. Defendants John Doe and Ruth Roe are Negroes whose names and identities are un-

known but will be added when ascertained and who have participated in the acts herein alleged.

The amount in controversy in this action is in excess of $10,000.00. This Court has jurisdiction by virtue of the amount in controversy and the fact that a Federal question is involved.

2. Since, to-wit, 1926, Plaintiffs, or their predecessor J.O. McClung, have operated a restaurant at 902 Seventh Avenue, South, in Birmingham, Alabama, under the trade name "Ollie's Barbecue". Plaintiffs' restaurant serves food and non-alcoholic beverages and specializes [fol. 2] in barbecued meats and home-made pies of which, to-wit, some 90% of their business consists. Plaintiff's restaurant is operated in a one-story building located on a tract of land fronting some 200 feet on Seventh Avenue, South, and running 190 feet along Ninth Street, in Birmingham, Alabama. Such restaurant represents a capital investment of more than $200,000. Their premises provide parking spaces for approximately 90 automobiles and most of plaintiffs' customers come to its restaurant by car. Plaintiffs serve approximately 500,000 meals per year, with a gross volume of sales of approximately $350,000, substantially all of which are to local customers. Plaintiffs' restaurant will seat approximately 200 persons at tables, booths and at counter seats. Plaintiff employ some 36 persons, 26 of whom are Negroes, and 10 of which are white. Both Negroes and white employees, as well as plaintiffs themselves serve food to customers for consumption on plaintiffs' premises.

3. Plaintiffs' business is essentially local in character. It is located some eleven blocks from the nearest Federal or Interstate highway, except for a truck route one block away from which it derives no trade. It is approximately 17 blocks from the nearest railroad station, more than 20 blocks from the nearest bus station and more than five miles from the nearest airport. Plaintiffs do no advertising and make no effort to attract transient customers. Their trade has been received and retained by virtue of the excellent quality of the food and service and the wholesomeness of the surroundings. Plaintiffs' business has operated in substantially the same manner since 1926, and its trade has been largely derived from recommenda-

tion of its customers. To plaintiffs' knowledge, they serve no "interstate travelers", as that term is used in the Civil Rights Act of 1964. Plaintiffs purchase all the food served in their restaurant locally, and all of such food is delivered to them locally and is paid for locally.

4. Plaintiffs have maintained the policy of reserving, and on occasion exercising, the right to refuse service to any person not acceptable to plaintiffs and whose presence on plaintiffs' premises would, in plaintiffs' opinion, be either detrimental to its business or contrary to the desires and preferences of its customers. Plaintiffs have never served Negroes any food or beverages for consumption on plaintiffs' premises, and have elected not to do [fol. 3] so voluntarily in the lawful and legitimate exercise of their right to operate their business and to use their property in such manner.

5. On, to-wit, July 2, 1964, the so-called Civil Rights Act of 1964, having been enacted by the Congress of the United States, was approved by the President of the United States. In Title II of said Act, it is provided in part as follows:

> Sec. 201 (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> * * * *
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> * * * *

* * * * *

(c) The operations of an establishment affect commerce within the meaning of this title if * * * (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves or gasoline or other products which it sells, has moved in commerce;

6. Since the enactment and approval of said Act, members of the Negro race, whose names and identity are unknown to plaintiffs, but will be added by amendment when ascertained (herein referred to in part as John Doe and Ruth Roe), have entered plaintiffs' restaurant and have demanded service of food or beverages for consumption on plaintiffs' premises. Plaintiffs, in accordance with their aforesaid policy, and choice, have refused service to such persons and have declined to serve them. Neither plaintiffs, nor certain of their employees are willing to serve members of the Negro race and if required to do so, such service would be "involuntary" as that term is used in the Thirteenth Amendment of the Constitution of the United States, wherein it is provided that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[fol. 4] 7. Plaintiffs' restaurant is located in a part of the City of Birmingham largely occupied by Negro residences, and by industrial concerns employing a large number of Negro employees. It is within some three blocks of a Negro high school with an enrollment of between twelve and thirteen hundred pupils and within some five blocks of two Negro grammar schools, one public and one a Catholic parochial school. Many of the pupils enrolled at these schools pass by or near plaintiffs' restaurant daily. For many years, plaintiffs have served Negroes food orders on a "take-out" basis, i.e., for consumption away from plaintiffs' premises. Plaintiffs are proud of and feel justified in their trade slogan, "The World's Best Barbecue", and, in view of the

amount of food heretofore sold to members of the Negro race on a "take-out" basis, avers that its food is enjoyed by such persons and that, if allowed service for consumption on the premises, such persons would occupy plaintiffs' restaurant in large numbers, contrary to the desires of plaintiffs, their employees and their regular customers and to the exclusion of plaintiffs' present customers. Plaintiffs' business and property would thereby suffer great injury.

8. Both prior to and following the enactment of the so-called Civil Rights Bill of 1964, the President of the United States, has publicly stated that the Executive branch of the government will enforce said Act in all of its parts. Defendants Kennedy and Weaver are presently enforcing said Act in other proceedings pending in this Court. Under Section 204 of said Act a so-called "person aggrieved" may institute a civil action for enforcement of Title II thereof against any person who has engaged or is about to engage in any practice purportedly prohibited by Title II of said Act. Enforcement or attempts to enforce said Act against plaintiffs by either defendants or by other so-called "aggrieved" persons would subject plaintiffs to the burdens, inconvenience and expense of litigation and the aggravation of such burdens and expenses occasioned by a potential multiplicity of suits and would otherwise interfere with and damage plaintiffs' property and business, all of which would do serious injury to plaintiffs.

9. Defendants Kennedy and Weaver have, inter alia, instituted or participated in proceedings in this Court and other Courts of the United States in which they have purportedly relied on that portion of the aforesaid Act [fol. 5] providing, in effect, that a restaurant's operations "affect commerce" if a substantial portion of the food which it serves has merely moved in commerce and said defendants, together with the President of the United States are known to contend that such provision of the Act represents a proper exercise by Congress of its delegated powers, with which contention plaintiffs disagree. Plaintiffs further aver that, while all of its purchases of food are made locally, i.e., within the State of Alabama,

and the operation of its restaurant in no way affects interstate commerce in the sense required for any such regulation thereof to constitute a lawful exercise of the power of Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, some of the food served by plaintiffs probably originates in some form outside the State of Alabama, Defendants or some of them contend or will contend that plaintiffs' restaurant is, on that account, within the purview of said Act, and will undertake to enforce the same under the provisions of Sections 204,205 or some other section thereof. Both the enforcement of said Act and the attempted enforcement thereof would do serious and irreparable injury to the plaintiffs.

10. Plaintiffs aver that the so-called Civil Rights Act of 1964 as it relates to restaurants and purports to be a legitimate exercise by Congress of its powers under the Interstate Commerce clause of the Constitution of the United States, is invalid and unconstitutional in that it exceeds the power therein given to the Congress; that this Nation is based upon the premise that all government is by consent of the governed and that the Congress of the United States has no power except as expressly or impliedly given by the Constitution and that no such power has been given to Congress under that document; that under the Tenth Amendment thereof, all powers not delegated are reserved to the States and to the people and that since neither the State of Alabama nor any subdivision thereof has any statute, ordinance or regulation requiring either the segregation or the integration of the races in plaintiffs' restaurant the right to determine how it shall be operated and its property used in this regard, is left to the plaintiffs. Plaintiffs having chosen voluntarily to operate their business and to use their property so as to decline to serve members of the Negro race, just as it has on occasion declined to serve others, are entitled to have such right and privilege protected by this Court. [fol. 6] Plaintiffs aver that their property and their investment therein are important property rights to them and that the enforcement of the so-called Civil Rights Act of 1964 against them as herein alleged, would de-

prive them of property without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States. In the event plaintiffs or their employees should be required to serve persons they have chosen not to serve, the rights of the plaintiffs and their employees to be free from involuntary servitude under the Thirteenth Amendment of said Constitution would be violated. Plaintiffs further aver that the property rights upon which they rely are ancient and fundamental, won in a progression of blood struggles against tyrany in various forms, and that, there being no legitimate powers given to Congress by the Constitution, to interfere with plaintiffs' said rights in the manner attempted in said Act, any effort to enforce said Act against these plaintiffs would be invalid, in contravention of natural law and in violation of the Tenth Amendment of said Constitution. Plaintiffs aver, therefore, that the so-called Civil Rights Act of 1964 as applied to them, their property and their business, is illegal, invalid and violative of their rights under the Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States as well as other provisions thereof, and should be so held by this Court.

11. There is a real and genuine threat that unless enjoined and restrained by this Court, defendants, their agents, employees or successors, or those acting in concert with them, will seek to enforce said Act against plaintiffs to their irreparable and serious injury, in an amount far in excess of $10,000.00. Plaintiff has no adequate remedy in law and this Court should enjoin defendants from enforcing or seeking to enforce said Act as herein prayed on one or more of the following grounds:

1. That the so-called Civil Rights Act of 1964 is unconstitutional and invalid.
2. That Title II of said Act is unconstitutional and invalid.
3. That Title II of said Act as applied to restaurants is unconstitutional and invalid.
4. That Title II of said Act as applied to these plaintiffs is unconstitutional and invalid.

WHEREFORE, plaintiffs pray that this Court will take jurisdiction of this action and upon the issuance of proper process to the defendants, making them parties [fol. 7] hereto and upon a hearing in this cause, will enjoin, restrain and prohibit the defendants, their agents, employees, successors and those operating in concert with them from:

1. In any manner enforcing or attempting to enforce the so-called Civil Rights Act of 1964 against these plaintiffs.
2. Causing, sponsoring, participating in or encouraging any demonstration, riot or other activity injurious to plaintiffs' business in support of the contention that said Act applies to plaintiffs' business.
3. Interfering, either directly or indirectly, in any manner, with the operation of plaintiffs' business or the use of their property under the pretext of enforcing, seeking to enforce, or acting pursuant to, said Act.

And plaintiffs pray further that pending a hearing and final judgment in this action, this Court issue a temporary injunction or, in the alternative, a restraining order enjoining, restraining or prohibiting the defendants, their agents, employees, successors and those acting in concert with them from the above activities.

/s/ Robert McD. Smith
/s/ William G. Somerville
/s/ James H. Faulkner
Attorneys for Plaintiff

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

Of Counsel

[fol. 8]

[Duly Sworn to by Ollie McClung, Jr.
Jurat Omitted in Printing.]

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. ——

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

PROPOSED TEMPORARY RESTRAINING ORDER

The foregoing Complaint having been presented to the Court and having been read and considered, it is hereby ordered that a temporary restraining order is hereby issued against the Defendants, their agents, employees, successors and those operating in concert with them from:

1. In any manner enforcing or attempting to enforce the so-called Civil Rights Act of 1964 against these plaintiffs.
2. Causing, sponsoring, participating in or encouraging any demonstration, riot or other activity injurious to plaintiffs' business in support of the contention that said Act applies to plaintiffs' business.
3. Interfering, either directly or indirectly, in any manner, with the operation of plaintiffs' business

or the use of their property under the pretext of enforcing, seeking to enforce, or acting pursuant to, said Act,

until further order of this Court or until the — day of August, 1964.

And Defendants are hereby ordered to show cause before this ourt on the -- day of August, 1964, a temporary injunction as prayed for in said Complaint should not be granted.

Done this — day of July, 1964.

.....

District Judge

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 64-448-So.

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

versus

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA; JOHN DOE AND RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

ORDER CONVENING THREE-JUDGE COURT—Aug. 4, 1964

WHEREAS Honorable Elbert P. Tuttle, Chief Judge of the United States Court of Appeals for the Fifth Circuit

is outside of the Circuit and temporarily unable to perform his duties as Chief Judge; and WHEREAS the undersigned is a Circuit Judge in active service, present in the Circuit, under 70 years of age, next in precedence, and able and qualified to act as Chief Judge pursuant to Title 28, United States Code, Section 45 (d); and WHEREAS, in my judgment, the public interest so requires; and

The Honorable Seybourn H. Lynne, United States District Judge for the Northern District of Alabama, to whom an application for injunction and other relief has been presented in the above-styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Richard T. Rives, as Acting Chief Judge of the Fifth Circuit, hereby designate the Honorable Walter P. Gewin, United States Circuit Judge, and the Honorable H. Hobart Grooms, United States District Judge for the Northern District of Alabama, to serve with Judge Lynne as members of, and with him to constitute the said court to hear and determine the action.

WITNESS MY HAND this 4th day of August 1964.

/s/ Richard T. Rives,
Acting Chief Judge.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America; ET AL, DEFENDANTS

NOTICE OF HEARING—Aug. 5, 1964.

Pursuant to the provisions of Title 28, Section 2284, notice is hereby given that the above-styled action has been set down for hearing on the prayer of plaintiffs for a temporary injunction on Tuesday, September 1, 1964, at 10:00 o'clock. a. m., in Courtroom No. 1 of the United States District Court, in Birmingham, Alabama, before the Honorable Walter P. Gewin, United States Circuit Judge, the Honorable Seybourn H. Lynne, Chief Judge, United States District Court, and the Honorable H. H. Grooms, Judge, United States District Court.*

This the 5th day of August, 1964.

WILLIAM E. DAVIS
Clerk, U. S. District Court,
Northern District of Alabama

* Counsel are required to file briefs on or before August 24 1964, with copy thereof to each one of the above-designated judges. All communications to Judge Walter P. Gewin may be addressed to Tuscaloosa, Alabama.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

REQUEST FOR ADMISSIONS—Filed Aug. 18, 1964

Come the plaintiffs and request that the defendants and each of them separately and severally within a period of ten days after the service hereof make the following admissions (for the purposes of this action only, and subject to all proper objections to admissibility which may be interposed at trial):

1. That defendant Robert F. Kennedy, is Attorney General of the United States and as such is the person charged with the enforcement of the legislation known as the Civil Rights Act of 1964.

2. That defendant Macon L. Weaver is United States Attorney for the Northern District of Alabama, and as such is an agent for defendant Kennedy within the Northern District of Alabama.

3. That defendants Kennedy and Weaver are attorneys of record in that certain action pending in this Court styled and further identified as United States of America,

by Robert F. Kennedy, Attorney General, Plaintiff v. Arthur B. Catrino, et al., Civil Action No. 64-443, in this Court and in said suit are enforcing or attempting to enforce said Civil Rights Act of 1964 against the defendants therein named.

4. That this Court has jurisdiction of this action.

5. That defendant Robert F. Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said Act against the plaintiffs or the plaintiffs' restaurant as described in the Complaint.

6. That plaintiffs have no adequate remedy of law.

/s/ Robert McD. Smith
Attorney for Plaintiffs

[fol. 13]

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

William G. Somerville, Jr.
317 North 20th Street
Birmingham, Alabama

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama

Of counsel

CERTIFICATE OF SERVICE [omitted in Printing]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448-S

[File Endorsement Omitted]

OLLIE McCLUNG, SR., and OLLIE McCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

NOTICE OF MOTION TO DISMISS—Filed Aug. 19, 1964

TO: LANGE, SIMPSON, ROBINSON & SOMERVILLE
317 N. 20th St. Birmingham, Alabama
James H. Faulkner
533 Frank Nelson Bldg.
Birmingham, Alabama

Attorneys for the Plaintiffs

Please take notice that the undersigned will bring the attached motion to dismiss the complaint on for hearing before this Court at the United States Courthouse, Birmingham, Alabama on August 24, 1964, at 10:00 a.m. or as soon thereafter as counsel may be heard.

/s K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-443-S

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

MOTION TO DISMISS THE COMPLAINT—Filed Aug. 19, 1964

Comes now Robert F. Kennedy, Attorney General of the United States, and Macon L. Weaver, United States Attorney for the Northern District of Alabama, and, specifically limiting their appearance to the sole purpose of advancing the instant motion and not submitting generally by this appearance to the jurisdicion of this Court, nor to service of process, nor waiving hereby the inadequacy and impropriety of service of process herein, and move this Court to dismiss the pending complaint for the reasons set forth hereinafter:

(1) This Court lacks jurisdiction over Robert F. Kennedy, Attorney General of the United States, in this suit since, under Rule 4(f), Federal Rules of Civil Procedure, process of this Court other than a subpoena may be served only within the territorial limits of the State of Alabama, and the defendant Kennedy was not personally served within the State of Alabama.

[fol. 16] (2) Robert F. Kennedy, Attorney General of the United States, is an indispensable party to this action, and service of process upon him being deficient, Macon L. Weaver, United States Attorney for the North-

ern District of Alabama, is not a property party defendant.

(3) The complaint fails to state a claim upon which relief can be granted.

(4) This Court lacks equitable jurisdiction because plaintiffs have an adequate remedy by way of defense to any proceeding to enforce Title II of the Civil Rights Act of 1964 against them.

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[Certificate of Service Omitted in Printing.]

[fol. 17] * * *

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; ET AL, DEFENDANTS

AMENDMENT TO COMPLAINT—Filed Aug. 21, 1964

Come now the plaintiffs, Ollie McClung, Sr. and Ollie McClung, Jr., and, without conceding that the original service of the summons and complaint heretofore made in this cause upon defendant Robert F. Kennedy, Attorney General of the United States, was deficient or that the Court did not acquire jurisdiction over said defendant Robert F. Kennedy by such service, and specifically reserving the right to oppose ground (1), and each and every other ground, urged in support of the motion of defendants Robert F, Kennedy and Macon L. Weaver to dismiss the complaint, hereby amend their complaint heretofore filed in this cause as follows:

1. By striking from the caption of said complaint the following words:

> "JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained,"

2. By striking from paragraph 1 of said complaint the following words:

"Defendants John Doe and Ruth Roe are Negroes whose names and identities are unknown but will be added when ascertained and who have participated in the acts herein alleged."

[fol. 19] 3. By striking from paragraph 6 of said complaint the following words:

"but will be added by amendment when ascertained (herein referred to in part as John Doe and Ruth Roe),"

4. By dropping and dismissing as parties defendant in said complaint and in the action all persons whose names appear in said complaint except Robert F. Kennedy, as Attorney General of the United States of America, and Macon L. Weaver, as United States Attorney for the Northern District of Alabama.

5. By inserting after the last sentence of paragraph 10 of said complaint the following words:

"Plaintiffs aver additionally that the Civil Rights Act of 1964 as applied to them, their business and its operation by them, and the enforcement by defendants of said Act as to them, would abridge and violate the freedoms and rights of plaintiffs protected by the First Amendment to the Constitution of the United States, and that, therefore, the Civil Rights Act of 1964 as applied to them, their business and its operation, is illegal and invalid under the First Amendment to the Constitution of the United States, and should be so held by this Court."

/s/ Robert McD. Smith
/s/ William G. Somerville
/s/ James H. Faulkner
Attorneys for Plaintiffs

OF COUNSEL:
LANGE, SIMPSON, ROBINSON & SOMERVILLE
EXCHANGE SECURITY BANK BUILDING
BIRMINGHAM, ALABAMA

Allowed

/s/ Seybourn H. Lynne,
Judge
September 1, 1964.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR., et al, PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al, DEFENDANTS

REQUEST FOR ADDITIONAL ADMISSIONS—Filed Aug. 24, 1964

Come the plaintiffs and request that the defendants and each of them separately and severally within a period of ten days after the service hereof make the following admissions (for the purposes of this action only, and subject to all proper objections to admissibility which may be interposed at trial):

7. That while testifying before the Committee on the Judiciary of the United States Senate, in connection with propsed legislation identified as S. 1731, Defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963:

> *Attorney General Kennedy.* "Well, I think if he ran a restaurant, Senator, he would be covered, under (3)(ii), so I don't think it would be very difficult. Subsection (3)(ii) covers establishments where "A substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce.' What we intend to cover are hotels, motels, depart-

ment stores, restaurants, variety stores and similar places." *Hearings*, p. 227.

* * * *

Attorney General Kennedy. "I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for him, if that is the great difficulty as to whether he is or is not covered. I would think that restaurants generally would be covered under this bill." *Hearings*, p. 229.

8. That defendant Kennedy contends that a restaurant which serves food, 20% of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

9. That defendant Kennedy contends that a restaurant which serves food, 10% of which has at any time and in any form moved across state lines, is a place of public [fol. 21] accommodations under Title II of the Civil Rights Act of 1964.

10. That defendant Kennedy contends that a restaurant which serves food, 1% of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

11. That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodation which refuses to serve Negroes because of their color.

12. That the averments of the Complaint in this action are sufficient to cause defendant Kennedy, as Attorney General of the United States to have reasonable cause to believe that the plaintiffs are engaged in a pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of defendant Kennedy as Attorney General

of the United States, under such circumstances, to use the powers given him under Section 206 of said act to compel compliance by plaintiffs with the provisions of the Act.

13. That defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964 and intends in his official capacity fully to carry out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act.

14. That, assuming that a substantial portion of the food served at plaintiffs' restaurant has moved in interstate commerce, defendant Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said act against the plaintiffs or their restaurant.

15. That defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States.

/s/ Robert McD. Smith
Attorney for Plaintiffs

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

William G. Somerville, Jr.
317 North 20th Street
Birmingham, Alabama

[fol. 22]

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama
Of counsel

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 23]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448-S

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

RESPONSE TO REQUEST FOR ADMISSIONS—Filed Aug. 24, 1964

Come now Robert F. Kennedy, Attorney General of the United States of America, and Macon L. Weaver, United States Attorney for the Northern District of Alabama, and in reply to the request for admissions filed by the plaintiffs herein make replies as follows:

1. The defendants admit that Robert F. Kennedy is the Attorney General of the United States. His responsibilities for the enforcement of the Civil Rights Act of 1964 are defined by that Act.

2. The defendants admit that Macon L. Weaver is the United States Attorney for the Northern District of Alabama. His responsibilities are defined by statute.

3. Paragraph 3 is admitted.

4. The defendants admit that this Court is the proper forum to dispose of this case. However, the defendants by their Motion to Dismiss have denied jurisdiction over Mr. Kennedy and have questioned whether the plaintiffs have stated a claim.

[fol. 24] 5. The defendants can neither admit nor deny statement 5 because the defendants are not at this time

in possession of sufficient information to determine whether and to what extent the operation of plaintiffs' restaurant is a public accommodation within the meaning of the Act. The plaintiffs have not conceded that the operation of their restaurant is within the Act. The defendants have already stated in their Memorandum in Support of the Motion to Dismiss (footnote 10 page 15) that they have not contemplated suit against plaintiffs.

6. The defendants deny statement 6, for the reasons set forth in their Memorandum in Support of the Motion to Dismiss.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 25]

[*Duly sworn to by K. William O'Connor jurat omitted in printing (all in italics)*]

[fol. 26]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 27]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., et al., PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

OBJECTIONS TO PLAINTIFFS' REQUEST FOR ADDITIONAL ADMISSIONS—Filed Aug. 31, 1964

Comes now the defendants Kennedy and Weaver and object to the plaintiffs' request for admissions 7 through 15, as follows:

REQUESTED ADMISSION 7

That while testifying before the Committee on the Judiciary of the United States Senate, in connection with proposed legislation identified as S 1731, defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963:

Attorney General Kennedy. Well, I think if he ran a restaurant, Senator, he would be covered, under (3) (ii), so I don't think it would be very difficult. Subsection (3) (ii) covers establishments where "A substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce." What we intend to cover are hotels, motels, depart-

ment stores, restaurants, variety stores and similar places. Hearings, p. 227.

* * * *

Attorney General Kennedy. I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for him if that is the great difficulty as to whether he is or is not covered. I would think that restaurants generally would be covered under this bill. Hearings, p. 229.

OBJECTIONS

The admission requested is not evidentiary in nature and is irrelevant to any matter now before this Court. The legal history of the Civil Rights Act of 1964 is set forth in public records and is as available to the plaintiffs as to the defendants and may be cited to the Court by the defendants if they deem it appropriate.

It is conceded that the Congressional Record accurately reflects the proceedings therein reported.

REQUESTED ADMISSIONS 8 THROUGH 10, INCLUSIVE

That defendant Kennedy contends that a restaurant which serves food 20 per cent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

[fol. 28] That defendant Kennedy contends that a restaurant which serves food, 10 per cent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

That defendant Kennedy contends that a restaurant which serves food, 1 per cent of which has at any time and in any form moved across state lines, is a place

of public accommodations under Title II of the Civil Rights Act of 1964.

OBJECTIONS

Since these three requests are identical except for the figures used, they are treated as one and jointly answered as follows.

The requests do not seek any relevant evidentiary facts, but ask for the legal opinion of the Attorney General of the United States and of the United States Attorney on patently hypothetical facts.

The plaintiffs have assiduously avoided stating facts sufficient to determine whether their operation is covered under the Civil Rights Act of 1964 or not. In lieu of evidence, the requested "admissions" seek a speculative opinion on hypothetical facts. These requests serve to emphasize the lack of any real case or controversy.

REQUESTED ADMISSION 11

That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color.

OBJECTIONS

The information sought is irrelevant and cannot lead to the discovery of any relevant evidence in that a general purpose of the Attorney General to perform the duties of his office cannot give the plaintiffs herein any right to relief.

REQUESTED ADMISSION 12

That the averments of the Complaint in this action are sufficient to cause defendant Kennedy, as Attorney General of the United States to have reasonable cause to believe that the plaintiffs are engaged in a

pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of defendant Kennedy as Attorney General of the United States, under such circumstances, to use the powers given him under Section 206 of said Act to compel compliance by plaintiffs with the provisions of the Act.

OBJECTIONS

This request does not seek evidence or information which can lead to the discovery of evidence, but rather seeks a legal opinion of the Attorney General regarding the sufficiency of the allegations of plaintiffs' complaint.

[fol. 29]

REQUESTED ADMISSION 13

That defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964 and intends in his official capacity fully to carry out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act.

OBJECTIONS

While the requested admission seeks entirely irrelevant information, the legislative history of the present Act publicly records defendant Kennedy's position on the passage of the Civil Rights Act of 1964.

There is no basis for requesting an advisory opinion from defendant Kennedy as to what his specific intentions might be as to nonspecific hypothetical situations not necessarily subject to the Civil Rights Act of 1964.

REQUESTED ADMISSION 14

That assuming that a substantial portion of the food served at the plaintiffs' restaurant has moved in in-

terstate commerce, defendant Kennedy As Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said act against the plaintiffs or their restaurant.

OBJECTIONS

This requested admission again seeks an irrelevant advisory opinion of the Attorney General of the United States based on hypothetical facts.

REQUESTED ADMISSION 15

That defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States.

OBJECTIONS

This request is not directed to the obtaining of any evidence nor to any information which could lead to evidentiary facts.

The attention of the plaintiffs is invited to the Memorandum in Support of Motion to Dismiss and in Opposition to the Prayer for Preliminary Injunction, hereinbefore filed by the defendants Kennedy and Weaver, for a detailed response to this requested admission.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 30]

[*Duly sworn to by W. William O'Connor jurat omitted in printing (all in italics)*]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., et al., PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

NOTICE OF HEARING—Filed Aug. 31, 1964

TO: Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama

Please take notice that the undersigned will bring on for hearing the attached Objections to Plaintiffs' Request for Additional Admissions hereinbefore filed, such hearing to be set at the convenience of the Court in accordance with Rule 36 of the Federal Rules of Civil Procedure.

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

Filed September 1, 1964, William E. Davis, Clerk by GEB

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, ET AL, DEFENDANTS

AFFIDAVIT OF WEAVER SATERBAK

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned, appeared Weaver Saterbak, who having been duly sworn deposed on oath and said:

I am Weaver Saterbak of Birmingham, Alabama. I am Office Manager of the Birmingham branch of Geo. A. Hormel & Company. This company has its principal office in Minnesota and is engaged in the business of slaughtering, processing and selling meats for human consumption.

According to the records in my office Ollie's Barbecue at Birmingham, Alabama, during the twelve month period from July 1, 1963, to July 1, 1964, purchased from Geo. A. Hormel & Company pork and beef for the total cost of $69,683.00. All of Ollie's purchases were made locally from the Birmingham branch, all orders were received by the Birmingham branch and all billing and collections handled by the Birmingham branch.

[fol. 33] All the meat sold to Ollie's was received by Hormel at its Birmingham branch from other facilities

of Hormel located outside the State of Alabama. Ollie's orders were filled from the warehouse in Birmingham. The cuts sold to Ollie's were regular cuts of a type normally used by restaurants specializing in Barbecue.

/s/ Weaver Saterbak
WEAVER SATERBAK

SWORN to and subscribed before me this 31st day of August, 1964.

/s/ Robert McD. Smith
Notary Public

Allowed
Sept. 1, 1964
/s/ Seybourn H. Lynne, Judge.

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

ADDITIONAL RESPONSE TO REQUEST FOR ADMISSIONS—
Filed Sept. 2, 1964

Come now Robert F. Kennedy, Attorney General of the United States of America, and Macon L. Weaver,

United States Attorney for the Northern District of Alabama, and in reply to the eleventh request for admissions filed by the plaintiffs herein make reply as follows:

REQUESTED ADMISSION #1

That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color.

RESPONSE

It is the policy of the Attorney General to enforce the Civil Rights Act of 1964.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[*Duly sworn to by K. William O'Connor jurat omitted in printing (all in italics)*]

[fol. 35]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 36]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL, DEFENDANTS

Before GEWIN, Circuit Judge, and LYNNE and GROOMS, District Judges.

OPINION, PER CURIAM—Sept. 17, 1964

PER CURIAM: This is a suit by the owners and operators of a restaurant business in Birmingham, Alabama, seeking to enjoin the enforcement of the provisions of title II of the Civil Rights Act of 1964[1] on the ground that they are unconstitutional. A statutory three-judge court was convened pursuant to 28 U.S.C.A. § 2282, and the case was set down for hearing on September 1, 1964, on plaintiffs' prayer for a temporary injunction. Prior to the hearing the defendants moved to dismiss the complaint on the separate grounds that (1) the court lacks jurisdiction over defendant Robert F. Kennedy[2] as Attorney General of the United States, be-

[1] Public Law 88-352; 78 Stat. 241.

[2] Since Robert F. Kennedy tendered his resignation as Attorney General of the United States, which was accepted after submission of this case to the court and since Nicholas deB. Katzenbach has been appointed Acting Attorney General of the United States, the

cause of insufficient service of process; (2) since defendant Robert F. Kennedy is an indispensable party, the insufficiency of service of process upon him renders co-defendant Macon L. Weaver, United States Attorney for [fol. 37] the Northern District of Alabama, an improper party defendant; (3) the complaint fails to state a claim upon which relief can be granted; and, (4) the court lacks equitable jurisdiction because plaintiffs have an adequate remedy at law. This motion was heard by and submitted to the full court on briefs and oral argument of counsel on September 1, 1964, and was taken along with plaintiffs' prayer for a temporary injunction.

THE MOTION TO DISMISS

The first two grounds for dismissal, both based upon the theory that service of process upon the Attorney General was defective, are no longer in issue. Service of process upon the Attorney General was made initially by certified mail in accordance with the provisions of 28 U.S.C.A. § 1391(e), and defendants contended that because fictitious parties were joined as defendants the provisions of section 1391(e) were inapplicable. Thereafter, plaintiffs amended their complaint by striking and dismissing therefrom the unserved fictitious parties and caused the complaint as amended to be re-served upon the Attorney General under section 1391(e). It was conceded by counsel for defendants on argument that the first two grounds in their motion to dismiss were thereby eliminated and accordingly are considered abandoned.

Defendants have also insisted in their brief and oral argument that the complaint does not present an actual controversy between the parties and that the adequacy of legal remedies deprives this court of equitable jurisdiction. These grounds were argued in the hearing on plaintiffs' prayer for temporary injunction at which evidence

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said Katzenbach is hereby substituted, in his official capacity, for the said Kennedy as a party defendant, as provided by Rule 25(d)(1) Fed. R. Civ. P.

[fol. 38] was adduced developing the undisputed facts set out below.[3]

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[3] 1. Plaintiffs are partners operating a restaurant under the trade style "Ollie's Barbecue" at 902 Seventh Avenue South, in Birmingham.

2. The plaintiffs' family has operated such restaurant under the same name and at the same location since 1927.

3. Plaintiffs' restaurant specializes in barbecued meats and home-made pies; approximately 90 to 95 per cent of its sales consist of such items and nonalcoholic beverages.

4. Plaintiffs' restaurant, when filled to capacity, will seat approximately 220 persons; its trade is derived from local regular customers who are for the most part known to the plaintiffs; its trade is predominantly composed of white collar business people and family groups. Plaintiffs feature in their restaurant a wholesome atmosphere in which no profanity or consumption of alcoholic beverages is allowed. The restaurant is closed on Sunday. Plaintiffs have in the past declined service to persons who have been profane and have given the appearance of drinking alcoholic beverages.

5. Plaintiffs' restaurant is located in an area of Birmingham in which are located primarily residences occupied by Negroes and light industrial development; in the nearby vicinity are several Negro churches and schools attended by Negro children.

6. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad station and bus station and between six and eight miles from the nearest airport.

7. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

8. In the twelve months preceding the passage of the Civil Rights Act of 1964, plaintiffs purchased approximately $150,000 worth of food, all locally. Approximately 55 per cent of this was for meat and between 80 and 90 percent of the meat purchases were from George A. Hormel & Company at its Birmingham branch. Its purchases from Hormel for that period were shown to be $69,783. All of the meat purchased from Hormel was shipped to its Birmingham branch from outside the State of Alabama.

9. Plaintiffs employ 36 persons at their restaurant, approximately two-thirds of whom are Negro. Plaintiffs personally prepare food and serve customers. Plaintiffs and some of their employees would not voluntarily serve meals to Negroes.

10. Since July 2, 1964, plaintiffs have not complied with the Civil Rights Act of 1964; they have, in fact, on more than one occasion, refused service to Negroes on an equal basis with white customers and on such occasions plaintiffs have been in actual viola-

Contending that there has not been a sufficient showing of a specific threat of immediate enforcement of title II of the act as to the plaintiffs, defendants insist alternatively that it is not alleged that defendants either have instituted enforcement proceedings against the plaintiffs or have conducted an investigation to determine whether plaintiffs have violated the act, and that insufficient facts are alleged to bring the plaintiffs within the coverage of the act.

[fol. 39] In urging that the allegations are insufficient to show coverage, defendants point first to averments in the complaint respecting the remoteness of plaintiffs' business from any place normally frequented by interstate travelers, the absence of any advertising by them and the averment that to their knowledge they serve no "interstate travelers" as that term is used in the act. It is true that these allegations, substantiated by evidence at the hearing, tend strongly to indicate an absence of coverage under title II insofar as it relates to a restaurant which "serves or offers to serve interstate travelers", and defendants have made no contention that they are covered by virtue of that part of the act.

Defendants then seize upon the averment that "some" of the food served in plaintiffs' restaurant originated in some form outside of Alabama. This use of the word [fol. 40] "some", say defendants, is insufficient because the act uses the term "substantial" in defining the portion of a restaurant's food which must move in commerce in order that it be within the alternative criterion of coverage prescribed by section 201(e)(2). We are of the opinion that the meaning of the term "substantial" as there used must and can only be determined judicially, and we conclude as a matter of law, on the basis of objective evidence, that a "substantial" portion of the

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tion of the act.

11. Because of their location and the manner of conducting their business, plaintiffs would lose a substantial amount of business if forced to serve Negroes in their restaurant. From its beginning, plaintiffs' restaurant has served only white trade.

12. A substantial portion of the food served in plaintiffs' restaurant has moved in commerce and plaintiffs have, since July 2, been in violation of the Civil Rights Act of 1964.

food served by plaintiffs has moved in commerce within the meaning of the act.

As defendants note, the complaint avers neither that enforcement proceedings have been instituted against plaintiffs nor that their restaurant was investigated by defendants prior to the commencement of the action. Plaintiffs do aver that prior to its filing they had violated the provisions of title II applicable to their restaurant by refusing to provide service to Negroes on the same basis as they provide to their other customers, and the evidence shows that since its commencement they have consistently continued and will continue thus to violate the act. In this respect alone the circumstances of this case are quite different from those existing in the cases urged by defendants in support of their position that this suit presents no justiciable controversy.

One of the plaintiffs testified further that he was caused in large part to institute this action by the fact that the defendants two days previously had filed in this court an enforcement suit against other persons operating restaurants of a similar character, and it appears from the complaint in that suit [4] that the act's coverage was invoked in part upon the basis that a substantial part of their food had moved in commerce. And plainly the Attorney General has indicated an intention to enforce [fol. 41] the provisions of title II as against its violators. We cannot say, in these circumstances, that enforcement against plaintiffs was not reasonably imminent when this action was commenced, and no case cited by defendants or found by us has held under comparable circumstances that for this reason an actual controversy did not exist.

There are, moreover, many instances in which a threat of imminent enforcement of a law has not been considered requisite to the existence of a justiciable controversy or the exercise by federal courts of equitable jurisdiction in similar suits seeking anticipatory relief from the operation and enforcement of the law.

In their complaint plaintiffs attack the validity of title II of the act in its entirety. The act requires in positive

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[4] Civil Action No. 64-443, Northern District of Alabama.

terms that the plaintiffs, in the operation of their restaurant, afford to all persons "the full and equal enjoyment of the goods, services [and] facilities." Consequently, as to the plaintiffs, title II creates a mandatory duty to which it commands immediate obedience. As against this, the plaintiffs contend, and it is the object of this suit to determine, that they have a constitutional right to operate their business free of the restrictions now imposed upon it by the act. They aver, and have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious impingement upon the plaintiffs' property rights. The existence of a justiciable controversy as well as the equitable jurisdiction of the federal courts and the right to injunctive relief have been upheld often under similar circumstances. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. [fol. 42] 238 (1936); *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534 (1958); *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). It is our considered opinion that these decisions are controlling upon the present case and that defendants' motion to dismiss the complaint therefore should be overruled.

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THE MERITS

Having negotiated the procedural hurdles, we proceed to an examination of title II of the Civil Rights Act of 1964:

> Section 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation

on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action: . . .

. . . .

(2) *any restaurant*, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

. . . .

(c) *The operations of an establishment affect commerce within the meaning of this title if* . . . . (2) *in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves*, or gasoline or other products which it sells, *has moved in commerce* . . . .

(Emphasis supplied.)

Contending that the foregoing portions of the act, as applied to the local business which they operate, are [fol. 43] unconstitutional, plaintiffs insist that when private establishments within the confines of the respective states, in the lawful and legitimate exercise of their private discretion, wish to select their customers there is no power, under the Constitution, or any of its amendments, granted to the federal government to regulate such private accommodations.

The heart of the federal compact beats in the tenth amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus it is to the Constitution and its amendments that we must look to determine

whether Congress possesses the power it has in this instance sought to exercise.

Insofar as we can determine from a review of the legislative history of the act[5] and the extensive debates in the Senate relevant to title II,[6] the only three suggested sources of congressional power were the thirteenth amendment, the fourteenth amendment, and the commerce clause.

At oral argument counsel for defendants forthrightly stated their opinion that the thirteenth amendment was neither authority for nor prohibitory of this legislation. We agree, thereby rejecting the argument of plaintiffs that the effect of such act is to impose upon them a con- [fol. 44] dition of involuntary servitude in violation of such amendment.[7]

It cannot be successfully contended that the above quoted portions of the act may be constitutionally applied to these plaintiffs under the grant of legislative power contained in the fourteenth amendment since it was conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises. *Civil Rights Cases*, 109 U.S. 3 (1883); *Peterson* v. *Greenville*, 373 U.S. 244 (1963).

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[5] 11 U.S. Code Cong. & Ad. News 1727-1891, 88th Cong., 2d Sess. (July 20, 1964).

[6] V Cong. Rec. 4757, 4593-4598, 4643-4655, 4680-4681, 4833-4835, 4906, 5066-5072, 5091-5104; VI Cong. Rec. 5454-5458, 5539-5543, 5690-5693, 5770-5771, 5851-5855, 5865-5871, 5879-5889, 6003, 6212-6214, 6234-6240; VII Cong. Rec. 6307, 6334-6341, 7039-7041; VIII Cong. Rec. 7552-7558, 7677-7684, 7816-7825, 7837-7854, 7966-7967, 8029, 8092, 8371, 8805-8806; IX Cong. Rec. 8849; (1964).

[7] *Compare*: Butler v. Perry, 240 U.S. 328 (1916); Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); State v. Sprague, 32 U.S.L. Week 2610 (New Hampshire Sup. Ct. 1964); Scheiber, *The Thirteenth Amendment and Freedom of Choice in Personal Service Occupations: A Reappraisal*, 49 Cornell L.Q. 508 (1964).

[8] Section 5 thereof reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In any discussion of the commerce clause as a grant of power to the national government to regulate activities commonly described as private and local we keep in mind the admitted fact that a majority of sincere and conscientious members of Congress believed this legislation to be in the national interest and necessary to end practices which they considered debasing to human dignity. Of course, we express no opinion as to the wisdom of the legislation and confine our consideration to the constitutionality of the provisions with which we are concerned.

The commerce clause, appearing in article 1, section 8 of the Constitution, reads as follows:

> "The Congress shall have Power . . . .
>
> . . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> . . . .
>
> . . .—And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

[fol. 45] The language is simple and unadorned. It has remained unchanged since 1789. With reference to it, to allay popular misgivings as to the nature and extent of powers vested in the Union by the new Constitution, James Madison wrote, "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[9] And Alexander Hamilton made it clear that the commerce clause was intended to restrain the "interfering and unneighborly regulations of some states."[10] In spite of its simplicity and clarity and because of the constantly increasing "interpenetrations of modern society,"[11] it has spawned thousands of cases.

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[9] The Federalist No. 45 (Madison).

[10] The Federalist No. 22 (Hamilton).

[11] Polish Alliance v. Labor Board, 322 U.S. 643, 650 (1944).

In *Civil Rights Cases*, 109 U.S. 3 (1883), at page 10, Mr. Justice Bradley characterized section 1 of the Civil Rights Act of 1875: "Its effect is to declare, that in all inns, public conveyances and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*." Thereafter, he posed and answered a question: "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [thirteenth, fourteenth and fifteenth]." Since the commerce clause had been in [fol. 46] the Constitution for almost one hundred years and since we are advised that the Solicitor General in brief had urged upon the court the sufficiency of its grant of power to sustain the challenged legislation, Mr. Justice Bradley's pronouncement is, to say the least, highly intriguing and might be accorded more than persuasive authority but for the subsequent statement in *Butts* v. *Merchants Transp'n Co.*, 230 U.S. 126 (1913), at page 132:

> "The question of the constitutional validity of those sections came before this court in *Civil Rights Cases*, 109 U.S. 3, and upon full consideration it was held (a) that they received no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power . . . ."

While we shall not attempt the impossible task of a precise delineation of the contours of the power to regulate interstate commerce granted the Congress or the Herculean labor of analyzing the multitudinous cases dealing with various aspects of what may be termed primary and implied power, we shall make an effort to distill from the decided cases a definitive statement of such power which may be applied to this case only.

Some presuppositions are permissible; indeed they are required by the teaching of *Wickard* v. *Filburn*, 317 U.S.

111, 120, "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. Gibbons v. Ogden, 9 Wheat. 1, 194-195."; of *Swift* v. *United States*, 196 U.S. 375, 398, ". . . commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."; of *The Pipe Line Cases*, 234 U.S. 548, 560-61, "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution . . . ."; and, of *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, "The authority of the federal government may not be pushed to [fol. 47] such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Proceeding to explicate our understanding of the nature and extent of the power with which we are concerned, it is quite unnecessary to labor the obvious, that the commerce clause constitutes an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one state to another. The cases are legion sustaining its exercise in this area.[12] Its power is not restricted, however, to the regulation of interstate commerce. Congress is further invested with the power to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce.

The power of Congress to regulate wholly intrastate activities is brought into play only when those activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from practices within a state which

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[12] *E.g.* United States v. International Boxing Club, 348 U.S. 236 (1955); United States v. Shubert, 348 U.S. 222 (1955); Radovich v. National Football League, 352 U.S. 445, 455 (1957); United States v. Frankford Distilleries, 324 U.S. 293 (1945).

burden its freedom or obstruct its flow.[13] The exercise of such power must necessarily be prospective, for the [fol. 48] reason that, unlike Tennyson's brook, interstate commerce does not run on forever. At some time it must come to an end within the boundaries of some state.[14]

This century has witnessed a dynamic expansion of federal control not only of the movements of commerce between the states but also of intrastate activities which have been found to burden its freedom or obstruct its flow. Thus Congress has exercised its power granted by the commerce clause to enact the Robinson-Patman Act,[15] the Federal Food, Drug and Cosmetic Act,[16] the White Slave Laws,[17] the Gambling Devices Transportation Act,[18] the Agricultural Adjustment Act of 1938,[19] the Fair Labor Standards Act,[20] and the National Labor Relations Act,[21] among others.

Concededly, the latter three, in broad extension of federal control, have immediate, direct and practical impacts upon activities which were at one time considered wholly

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[13] United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Santa Cruz Co. v. NLRB, 303 U.S. 453 (1938); Labor Board v. Jones & Laughlin, 301 U.S. 1 (1937); Edison Co. v. Labor Board, 305 U.S. 197 (1938); Labor Board v. Fainblatt, 306 U.S. 601 (1939); United States v. Darby, 312 U.S. 100 (1941).

[14] Gibbons v. Ogden, 9 Wheat. 1 (1824); Schecter Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Welton v. Missouri, 91 U.S. 275 (1875); Bowman v. Chicago & N. Ry. 125 U.S. 465 (1888); Packer Corporation v. Utah, 285 U.S. 105 (1932); Florida v. United States, 282 U.S. 194 (1931); Yonkers v. United States, 320 U.S. 685 (1944); Palmer v. Massachuetts, 308 U.S. 79 (1939).

[15] 52 Stat. 446, 15 U.S.C.A. § 13(c).

[16] 52 Stat. 1040, as amended, 21 U.S.C.A. §§ 301-392.

[17] 36 Stat. 825, as amended, 18 U.S.C.A. §§ 2421-2424.

[18] 64 Stat. 1134, 15 U.S.C.A. §§ 1171-1177.

[19] 52 Stat. 31, as amended, 7 U.S.C.A. §§ 1281-1407.

[20] 52 Stat. 1060, as amended, 29 U.S.C.A. §§ 201-219.

[21] 49 Stat. 449, as amended, 29 U.S.C.A. §§ 151-159.

intrastate in nature thus resting in the domain of state control.

In each instance Congress cautiously made clear legislative findings that the regulation of the intrastate practices dealt with was necessary or appropriate to the effective execution of its expressly granted power to regu- [fol. 49] late interstate commerce. In the National Labor Relations Act such findings are set forth in 29 U.S.C.A. § 151. Moreover, assurance was given that regulation of essentially local matters would apply only where there was an actual effect on interstate commerce by requiring that this be determined administratively or judicially on a record in each individual case. 29 U.S.C.A. §§ 159(c) and 160(a). In the Agricultural Adjustment Act Congress made elaborate findings to establish an effect on commerce of the intrastate activities sought to be regulated. 7 U.S.C.A. §§ 1311; 1321, 1331, 1341, 1351, 1357, 1379(a), and 1380.

The Fair Labor Standards Act contains a built-in limitation on its enforcement by requiring a judicial determination of the ultimate fact that acts of employers or employees actually affect such commerce on a case by case basis.

The Civil Rights Act of 1964 contains no legislative findings and we proceed to a critical examination of its provisions to determine whether it may nevertheless successfully survive the constitutional challenge. It is our opinion that neither of the three above-mentioned acts is an apposite analogy and that the cases arising thereunder afford scant persuasive authority beyond the broad principles enunciated therein.[22]

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[22] That the National Labor Relations Act may not be analogized to the Civil Rights Act of 1964 and that the power of Congress is not plenary with respect to the regulation of activities not themselves interstate commerce is made crystal clear by Mr. Justice Black's concurring opinion in Polish Alliance v. Labor Board, 322 U.S. 643,652:

"The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to

[fol. 50] The duty of this court is classically defined in *United States* v. *Butler*, 297 U.S. at pages 62 and 63:

> "There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. this is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.
>
> "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to them-

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interstate commerce . . . . In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation . . . . It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' . . . "

selves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members."

Paraphrased, for clarity of discussion, title II of the act declares that no restaurant may refuse service to any person because of his race, color, religion, or national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce.

[fol. 51] No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir. 1959); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

On the authority of the cases collected in footnote 14, *infra*, we believe it to be a settled rule of constitutional law that goods cease to constitute a part of interstate commerce, and become a part of the general property in a state, and amenable to its laws, when they are sent into a state, either for the purpose of sale or in consequence of a sale. The simple truth of the matter is that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce.

If our premise is correct, Congress sought to achieve its end by the sophisticated means of first declaring a restaurant is a place of public accommodation if its operations affect commerce and by thereafter abandoning the "affect commerce" requirement by legislating what is

tantamount to a conclusive presumption that its operations do affect commerce if it is proved either that it serves or offers to serve interstate travelers or that a substantial portion of the food which it serves has at some time, however remote, moved in commerce. The courts will not sustain a presumption when there is [fol. 52] "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot v. United States*, 319 U.S. 463, at 467-468. The issues presented in the instant case require our consideration of only that portion of the statute relating to restaurants which serve food "a substantial portion" of which "has moved in commerce."

If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct "affect[s] commerce" when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.

We conclude that title II of the Civil Rights Act of 1964, as applied to the business operated by these plaintiffs, was beyond the competence of Congress to enact and that its enforcement against plaintiffs under the circumstances of this case would be violative of the fifth amendment of the Constitution of the United States, in pertinent part reading: "No person shall be . . . deprived of . . ., liberty, or property, without due process of law; . . ." Accordingly, they are entitled to the relief for which they pray.

This 17th day of September, 1964.

Walter P. Gewin
CIRCUIT JUDGE

Seybourn H. Lynne
DISTRICT JUDGE

H. H. Grooms
DISTRICT JUDGE

[fol. 52-a]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL, DEFENDANTS

ORDER OVERRULING MOTION TO DISMISS—Sept. 17, 1964

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

IT IS ORDERED, ADJUDGED and DECREED by the court that the motion in behalf of defendants to dismiss the complaint herein be and the same is hereby overruled.

Done, this the 17th day of September, 1964.

WALTER P. GEWIN
Circuit Judge

SEYBOURN H. LYNNE
District Judge

H. H. GROOMS
District Judge

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL., DEFENDANTS

TEMPORARY INJUNCTION—Sept. 17, 1964

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the defendant, Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America, and his agents, servants, employees, successors in office and those in concert with him who shall receive notice of this order, be and they are hereby temporarily restrained and enjoined from enforcing the provisions of title II of the Civil Rights Act of 1964 against plaintiffs Ollie McClung, Sr. and Ollie McClung, Jr., as partners operating a restaurant under the trade name "Ollie's Barbecue" at 902 7th Avenue South, in Birmingham, until further order of this court.

Done, this the 17th day of September, 1964.

WALTER P. GEWIN
Circuit Judge

SEYBOURN H. LYNNE
District Judge

H. H. GROOMS
District Judge

[fol. 54]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; and MACON L. WEAVER, as United States Attorney for the Northern District of Alabama, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Sept. 17, 1964

I

Notice is hereby given that the Attorney General of the United States, and the United States Attorney for the Northern District of Alabama, defendants in the above-entitled case, hereby appeal to the Supreme Court of the United States from the order granting a temporary injunction entered in the case on September 17, 1964.

This appeal is taken pursuant to 28 U. S. C. 1252.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the:

1. Complaint, filed by the plaintiffs on July 31, 1964;

2. Order of Acting Chief Judge of the Fifth Circuit, Richard T. Rives, entered August 4, 1964, designating a District Court of three judges to hear this case, to consist of Circuit Judge Walter P. Gewin, District Judge Seybourn H. Lynne, and District Judge H. Hobart Grooms;

3. Notice by the Clerk of this Court on August 5, 1964, that the motion on the plaintiffs for a temporary injunction had been set down for a hearing on September 1, 1964;

4. Request for Admissions filed by the plaintiffs on August 18, 1964;

5. Motion to Dismiss the Complaint filed on August 19, 1964, by the defendants, and notice that said motion would be brought on for hearing on August 24, 1964;

[fol. 55] 6. Amendment to Complaint, filed by the plaintiffs on August 21, 1964;

7. Request for Additional Admissions, filed by the plaintiffs on August 24, 1964;

8. Response to the Request for Admissions, filed by the plaintiffs on August 24, 1964;

9. Objections to Plaintiffs' Request for Additional Admissions and notice that said objections would be brought on for hearing, filed by the defendants on August 31, 1964.

10. Affidavit of Weaver Saterbak, filed by the plaintiffs on September 1, 1964;

11. Order of the Court granting the plaintiffs' Motion to Amend the Complaint, entered September 1, 1964;

12. Additional response of the defendants to the Request for Admissions, filed September 2, 1964;

13. Opinion and Order entered by the Court on September 17, 1964, denying the defendants' Motion to Dismiss, granting the plaintiffs' request for a temporary injunction and declaring invalid as applied the applicable portions of Title 2 of the Civil Rights Act of 1964;

14. This Notice of Appeal;
15. Transcript of September 1, 1964 hearing on the plaintiffs' Motion for a Preliminary Injunction and the defendant's Motion to Dismiss.

III

The following questions are presented by this appeal:

1. Whether the District Court erred in failing to dismiss the action upon the ground that there was no justiciable controversy;
2. Whether the District Court erred in failing to dismiss the Complaint because a full and complete remedy was available by way of a defense to a proceeding under the Civil Rights Act of 1964;
3. Whether the District Court erred in granting an order restraining the enforcement of the Civil Rights Act of 1964 where the plaintiffs showed no irreparable injury, where the balance of equity clearly favors the defendants, and where the plaintiffs are unlikely to succeed on the merits because Title 2 of the Civil Rights Act of 1964 is constitutional both upon its face and as applied to the plaintiffs.

NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ Macon L. Weaver
By: MACON L. WEAVER
United States Attorney

[fol. 56]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 57] * * *

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448-S

OLLIE McCLUNG, SR., and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA; JOHN DOE AND RUTH ROE, Whose Names Are Otherwise Unknown, but Will be Added By Amendment When Ascertained, DEFENDANTS

Birmingham, Alabama

PROCEEDINGS OF SEPT. 1, 1964

BEFORE:

HONORABLE WALTER P. GEWIN
HONORABLE SEYBOURN H. LYNNE
HONORABLE H. HOBART GROOMS

APPEARANCES:

MESSRS. ROBERT McDAVID SMITH and WILLIAM G. SOMERVILLE, JR., of the firm of Lange, Simpson, Robinson & Somerville, Exchange-Security Bank Building, Birmingham, Alabama, and MR. JAMES H. FAULKNER, of the firm of Bowers, Dixon, Dunn & McDowell, Frank Nelson Building, Birmingham, Alabama, for the plaintiffs.

[fol. 59]

MESSRS. ST. JOHN BARRETT and K. WILLIAM O'CONNER, Department of Justice, Washington 25, D. C., and MR. MACON L. WEAVER, United States District Attorney, Birmingham, Alabama, for the defendants.

[fol. 60] * * *

[fol. 61] PROCEEDINGS

JUDGE GEWIN: Gentlemen, I believe the case is before us on motion to dismiss the complaint. I would like to hear from you.

MR. WEAVER: Your Honor, if I might I would like at this time to introduce Mr. St. John Barrett of Washington, representing the Department, and William O'Conner from Washington.

JUDGE GEWIN: Glad to have you.

MR. SMITH: Before the matter of the motion is dealt with in argument we would like to present the Court with a memorandum brief on these points we have filed since we received the brief of the Government, and if I could approach the Court I would like to present it at this time.

JUDGE GEWIN: All right. The jurisdictional question now has been eliminated. The question of service—

MR. BARRETT: Your Honor, we don't urge that.

JUDGE GEWIN: Well, it comes down to the question of consideration of the motion to dismiss, I take it.

MR. SMITH: Your Honor, there is another matter at this time we would like to call your attention to. We [fol. 62] have an affidavit we would like to file at this time as—in support of the Bill of Complaint. We expect to offer live witnesses as the trial proceeds but it

is, of course, appropriate to support a complaint for preliminary injunction with an affidavit. The matters covered in this affidavit relate to the purchase of meat by the plaintiff restaurant, the portion of that meat that moves across the State lines. At the time the complaint was prepared and filed this information wasn't known and certainly wasn't known to the plaintiffs. We obtained this from the George A. Hormel Company and I would like to file that as it would bear on this motion.

JUDGE GEWIN: You have any objection to that?

MR. BARRETT: None at all.

JUDGE GEWIN: It will be admitted.

You say you wish to offer evidence, Mr. Smith? We thought it would be appropriate to take the motion along with the case, the motion to dismiss, unless counsel feels strongly like they would like to argue it now.

MR. BARRETT: We have no objection to proceeding that way.

[fol. 63] MR. SMITH: We thought we would like to hear argument on the motion but that is entirely satisfactory.

There is one other matter we would like to bring to the Court's attention. Sometime ago the plaintiffs in this case filed a Request for Admissions on the defendants. The response to that request was received approximately twelve days ago. I believe it may be shown in the file the Court has. After receiving the first response the plaintiffs filed additional Requests for Admissions, continuation of the admissions asked for previously and touching upon matters that were brought to focus by the answers given in the first request. This morning we received from the defendants objections to those additional Requests for Admissions. No objection on the ground they are additional but they have been received and we assume they are before the Court.

We would like to address ourselves briefly to that matter. We believe that it will simplify the proceedings here and also shorten the record if we can have the admissions. These are the objections of the defendants and perhaps they would like to address themselves to [fol. 64] them. I would like the Court to consider them at this time before we start putting evidence on.

JUDGE GEWIN: All right, would you like to support your objections to the requests?

MR. BARRETT: Yes. Would it help the Court if I read the admissions?

JUDGE GEWIN: Very definitely.

MR. BARRETT: The prior admissions, Requests for Admissions to which we did respond and raised no objection related to the respective position of the defendants, Kennedy and Weaver. We have admitted that and the responsibility generally to enforce the Civil Rights Act which we conceded. And we pointed out it is defined by Statute. And we conceded, although I think it was purely a question of law rather than fact, that this Court is the proper forum to dispose of whatever issue is raised by the complaint.

With respect to whether or not the restaurant here involved is within the terms of the Statute, we answer we were unable to admit or deny that for lack of information regarding the operations of the restaurant. In any event it didn't—our position on the legal issue [fol. 65] here is already stated in our legal memorandum.

The additional Request for Admissions, the first one which is No. 7, is as follows: "That while testifying before the Committee on the Judiciary of the United States Senate, in connection with proposed legislation identified as S1731, Defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963: 'Attorney General Kennedy: Well, I think if he ran a restaurant, Senator, he would be covered under Paragraph 3(ii), so I don't think it would be very difficult. Subsection 3(ii) covers establishments where a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire, has moved in interstate commerce. What we intend to cover are hotels, motels, department stores, restaurants, variety stores and similar places.'"

Then another question and, "Attorney General Kennedy: I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for

him if that is the great difficulty as to whether he is or [fol. 66] is not covered. I would think that restaurants generally would be covered under this bill."

We object to this on the ground it doesn't call for any admission of an evidentiary nature nor for any information that can lead to discovery of evidence. It is merely a question as to whether the records of the hearing before the Congressional Committee are accurate. We will concede their accuracy but—if that will serve the plaintiff, but as to whether or not these particular things were said we think are completely divorced from any question of fact that can be disputed before this Court.

JUDGE LYNNE: Mr. Barrett.

MR. BARRETT: Yes, Judge Lynne.

JUDGE LYNNE: Wouldn't—if it became necessary to examine the legislative history, wouldn't the Court be permitted to take judicial notice of any official records of the—

MR. BARRETT: Oh, yes, indeed. I think the Court can rely on the records of the hearings. I think it is inappropriate and that is our objection to make of this sort of thing a Request for Admission. They might as [fol. 67] well ask us whether Cooley's Volume on Constitutional Law contains a particular sentence. We can look at it and the Court can look at it and it is really an anticipatory argument rather than a real Request for Admission. We don't mean to quibble about the form but we have already answered admissions and we are reluctant to continue responses to this sort of thing.

JUDGE LYNNE: Mr. Smith, with that concession do you insist on that Request for Admission?

MR. SMITH: Your Honor, as I understand the concession, I think we can move along. As I understand it, they say the entire legislative history, including the entire argument referred to here in the hearings before the Senate Judiciary Committee would be considered before the Court.

We have the right to refer to it in brief or to this Court or have the right to call it to the attention of any Court, is that the position?

MR. BARRETT: Yes, sir.

MR. SMITH: However, I don't agree that this is not evidentiary. This is a defendant in the case who made a statement in his official capacity testifying before a [fol. 68] Committee of the United States Senate, and I think what he said is very important from an evidentiary standpoint because one of the very points we are dealing with is his intentions of enforcing the Civil Rights Act and he has equivocated in whatever response we have received up to now. So we think these things are important evidence in view of his equivocation and whether he intends to enforce it or not.

JUDGE GEWIN: Whether law or fact you both agree we can look at it?

MR. SMITH: Yes, sir.

JUDGE GEWIN: Well, I think we will sustain the objection with that understanding.

MR. SMITH: All right, sir.

MR. BARRETT: May it please the Court, Requested Admissions 8, 9 and 10 we consider together. They are essentially the same. They are as follows, "That Defendant Kennedy contends that a restaurant which serves food twenty percent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964."

Then 9 and 10 are exactly the same requests but [fol. 69] changing the amount of food to ten percent in 9 and one percent in the case of 10.

Again our objection is that this is not a request for any admission of fact or for any factual information that could lead to the discovery of evidence. It is clearly a request for the view of the Attorney General on a question of law. It doesn't relate to any evidence even if he could seek a legal opinion from the Attorney General. There hasn't, of course, been any evidence in this case but the views of the Attorney General will be expressed in oral argument and in briefs such as we have submitted and will submit to the Court.

To seek a legal opinion in a Request for Admissions based on a purely hypothetical state of facts to our mind

merely emphasizes the validity of our position that this whole proceeding really does not involve a case of controversy but is merely a legal argumentation in which the plaintiff seeks the views of this Court on an abstract principle of law and in an effort to arrive at that point are seeking to perhaps narrow or limit the position of the Attorney General on purely legal issues.

[fol. 70] For that reason we object to these admissions.

JUDGE GEWIN: Suppose the proof did later show, we will say ten percent, suppose the proof did show ten percent, you think your argument would still be the same?

MR. BARRETT: Well, if Your Honor please, our position would be if it appeared as a matter of fact that say ten percent of the food served by a particular restaurant had moved in interstate commerce, the Attorney General would have to make his decision, as the person responsible for enforcing the Act, whether or not he should seek enforcement with respect to that restaurant. If he decided it was within the Act and that he should seek enforcement he would bring a particular proceeding and that would frame the issues and the Court would then have to determine it.

But to express a view say on all restaurants in the United States as to whether this one is within the Act and that one isn't, upon a request by the proprietors would be merely to enter upon almost the practice of law, at least on this point, and be under an obligation to render legal advice and commit the Department of Justice with respect to particular fact situations which [fol. 71] have not been brought into issue by proper proceedings. So I think we actually should object unless it is framed in an actual case.

MR. SMITH: May it please the Court, I think Mr. Barrett may have gone to another question in part of his answer. What we have asked for here is for them to admit the Attorney General intends that a restaurant which serves food of a certain percentage that has moved across state lines is a place of public accommodation. In this particular request we have not made reference to the enforcement. I don't think the Attorney

General has any discretion of determining what comes under the Act of Congress. The question is whether he contends it comes under the Act. Whether he enforces it or whether he decides to enforce it under Section 206 is not asked in this question.

Certainly this is not hypothetical and certainly this does not ask for a legal opinion. In the brief filed by the Attorney General in this case, which was received by us before asking that question, he cited a case in which interstate commerce was upheld under a Section of the Wage and Hour Law which we say is different, but he cited a case there that held that one-half of one [fol. 72] percent was enough to bring the case within the power of commerce. We haven't gone down to one-half of one percent. We have gone from twenty percent to ten percent to one-half percent.

Now, because the position has been taken in the brief and in the first response to Requests for Admissions, it is incumbent upon us as we see it to establish to this Court's satisfaction that the Attorney General of the United States intends to consider that any restaurant is covered by this Act and is a place of public accommodation, which is the term used in this request, if any of the food it serves has moved in commerce, else why do they cite the case of one-half of one percent.

Now, at some point we have to know his contention in this regard. It isn't hypothetical because we have already presented to Your Honor an affidavit which shows that a portion of the meat served by this plaintiff here that did cross state lines. Now, it is incumbent upon us to show there is a case of controversy on the point they raise. Now, the case of controversy in this instance happens to arise out of the official position of the Defendant Kennedy. I can't think of anything more [fol. 73] relevant than what he contends or what his judgment is as to the application of the Act.

JUDGE LYNNE: Let me ask you this, Bobby.

You think that it is the function of Requests for Admissions to request that an adversary state his legal positions?

MR. SMITH: No, sir, I think you have to consider this in the context of the other requests made. In this

particular instance in view of the position he has taken throughout the legislative history which is very broad and covers many volumes and covers a whole lot of things, it is difficult for us to put before the Court in one single case, and for that reason we felt we were not asking just for a legal opinion but we are asking for the fact which is his contention as to the enforcement of this law and as to the application of this law. Ordinarily, of course, this would involve a legal opinion we couldn't ask the other lawyer for but in this case he is a party. We feel that the legislative history abundantly shows that he does contend that a restaurant that serves food, twenty percent of which has crossed state lines, is cov-
[fol. 74] ered and we expect the legislative history to show that he intended all restaurants to be covered. So, for that reason we thought this was an appropriate request. This comes right down to the question in the case in controversy. The controversy here is does this Act mean to cover every restaurant in the United States if any food, no matter where it came from, has crossed state lines, as sometimes—I believe it was put in his statement before the Senate Committee, "At any time between the ratification of the Constitution and the time he is called on for service".

Now, we believe we need to develop that and that is the reason we ask for it.

JUDGE GEWIN: Then your position is you are not seeking a legal opinion but you are seeking to determine what he contends the law is?

MR. SMITH: That is correct.

JUDGE GROOMS: And whether or not this action can be maintained.

MR. SMITH: Yes, sir, goes directly to the case of controversy.

MR. BARRETT: If Your Honor please, had counsel asked by interrogatory or Request for Admissions wheth-
[fol. 75] er or not the Attorney General was preparing, had prepared or contemplated bringing an action with respect to this restaurant, I would concede—I won't concede that would be a proper request, but it would be a request for a fact which is the state of mind, I sup-

pose, of the Attorney General with respect to his particular client. But when he says that the case for controversy is whether or not the Act extends to all restaurants, he is stating an abstract legal proposition and the fact he is trying with these discovery devices to somehow jell this abstract legal question into the context of something resembling a lawsuit, merely illustrates the essence of what he is doing. Now, it is true that an affidavit has been filed today saying that some of his meat comes from outside of the State of Alabama. But we don't know where the rest of his produce comes from. Whatever the percentage this is to the total we don't know what the true facts are. And the Attorney General has made no effort in connection with the enforcement of this Act to ascertain the true facts or to determine whether or not he should or should not bring a lawsuit.

These plaintiffs are merely seeking to—by asking this [fol. 76] Court to assume injunctive equitable jurisdiction, is seeking to commit this Court to rule on the validity in anticipation of a defense that the restaurant might raise in the future if hereafter the Attorney General should determine to file a lawsuit with respect to this restaurant. File such a suit that would have to be in this very court and he asks that the Court now on purely hypothetical facts pre-commit itself as to what it would do if such a lawsuit was filed.

JUDGE LYNNE: Of course, we are now getting into the factual issue of justicibility.

MR. BARRETT: Yes, sir.

JUDGE LYNNE: The thing about it is this Request for the Admission is parallel with the request in an ordinary personal injury action where the defendant comes in and asks the plaintiff to admit that he contends that the negligence of the defendant consists in this or that or something else which is purely and simply a Request for Admission as to a legal contention.

MR. BARRETT: Oh, yes, indeed, Judge, but we are not suing.

[fol. 77] JUDGE LYNNE: I understand.

MR. BARRETT: We have made no contentions. They are coming in and seeking to create a lawsuit as it were.

JUDGE LYNNE: I am with you on your objection. But I think that they are requesting you to admit a legal contention and I think that is the function of a Request for Admission.

MR. BARRETT: In essence they are trying to make us sue them, either sue them or commit ourselves to say that they are not suable. That is exactly what it seems to me that it boils down to. You just don't frame a case of controversy by making that sort of demand on a Court.

JUDGE GEWIN: We will sustain as to 8, 9 and 10. Sustain the objection.

MR. BARRETT: The admission requested in No. 11 is, "That it is the policy of the Defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color."

[fol. 78] We state substantially the same objection to that, it doesn't call for any evidence or information that can lead to evidence but will certainly concede that the duties of the office of the Attorney General requires it incumbent to enforce all of the laws of the United States with respect to which he is given enforcement power as in the case of the Statute.

JUDGE GEWIN: The basis of this request may have been generated by some case in Connecticutt involving contraceptives where one Court said that there was no policy of enforcement anyway. It was strictly a question of policy of enforcement.

MR. BARRETT: If the plaintiffs are fearful or wonder whether the Attorney General is going to desist from performing what appears to be his duty under the Act because in his view the Act is patently unconstitutional, certainly I can relieve them of that fear.

JUDGE GROOMS: Is it your contention that the Attorney General will enforce the law?

MR. BARRETT: Yes, it is.

MR. SMITH: May I be heard briefly on that?

JUDGE GEWIN: Yes, sir.

[fol. 79] MR. SMITH: The only objection to this is that it is irrelevant and cannot lead to a discovery of any relevant evidence. That is the only objection taken to this particular request. We can't think of any more relevant evidence in this case where they have said there is no case of controversy than whether is the policy of the Attorney General to enforce this law on the facts set out in this request. May we call the Court's attention to the fact that Section 206 of the Act says that where a pattern or policy of exclusion has been found, that the Attorney General may proceed in the District Courts of the United States to enforce the law.

Now, with respect to this particular defendant, Attorney General Kennedy, we think it is important that his office has the policy of enforcing it under these circumstances. We can't think of anything more relevant.

JUDGE GEWIN: We will require an answer to eleven.

MR. SMITH: All right, sir.

JUDGE GEWIN: Unless someone has a better light to give us.

MR. BARRETT: I think in essence what I have said [fol. 80] answers it and I would be glad to reduce it to a written answer.

The next objection to the next Request for Admission which is No. 12 reads, "That the averments of the complaint in this action are sufficient to cause Defendant Kennedy, as Attorney General of the United States, to have reasonable cause to believe that the plaintiffs are engaged in a pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of Defendant Kennedy as Attorney General of the United States, under such circumstances, to use the power given him under Section 206 of said Act to compel compliance by plaintiffs with the provisions of the Act."

Now, again this is simply a request for the views of the Attorney General as to the suability of the plaintiffs upon the stated facts stated in the complaint. In look-

ing at it another way, it is a request for our opinion, I suppose, as to the sufficiency of their complaint. This is purely a legal question that will have to be argued [fol. 81] to and decided by the Court but not the sort of thing that can be sought through admissions of fact.

JUDGE GEWIN: Mr. Smith.

MR. SMITH: May it please the Court, the averments of the complaint show that the plaintiffs in this case have declined to serve Negroes that applied to be served. It shows—the affidavit in support filed today, and even before that, shows substantially a portion of the food purchased and sold by them, served by the plaintiffs, moved in commerce across state lines. On those facts I am unable to see what part of this Mr. Barrett contends is asking for an opinion. We say that we have refused service and we say that a substantial portion of the food served crossed state lines. Now, if it is the policy of the Department to enforce the law under those circumstances, I can't see that we are asking for anything hypothetical.

JUDGE GEWIN: We will sustain as to No. 12.

MR. BARRETT: The 13th Request for Admissions reads, "That Defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964, and intends in his official capacity fully to carry [fol. 82] out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act."

As to the latter clause of that request I think we have already dealt with it. As to whether Mr. Kennedy personally sponsored and encouraged passage of the Act, I think the legislative history shows that he was instrumental in urging its adoption and hammering out the terms of the Statute itself. He many times expressed the importance of its enactment and compliance with its terms but we do object to the Request for Admission. It isn't asking, in our judgment, for anything of an evidentiary nature.

MR. SMITH: I think the point raised there has been argued by both sides and we don't care to argue that particular point.

JUDGE GEWIN: Sustain as to thirteen.

MR. BARRETT: The 14th Request for Admission reads, "That assuming that a substantial portion of the food served by the plaintiffs' restaurant has moved in interstate commerce, Defendant Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said Act [fol. 83] against the plaintiffs or their restaurant."

Again we object on the ground it doesn't call for any evidence but asks for a legal conclusion based on a hypothetical set of facts. It says, "Assuming a substantial portion". Well, even if that assumption was somehow permissible, there are other facts that go into the determination whether or not the Attorney General brings a lawsuit. One is the national interest and the other is whether or not there is a pattern and practice of discrimination as distinguished as to whether or not a particular individual was turned away by reason of his race. The individual can bring a lawsuit under the Act but if the Attorney General is to bring the lawsuit there must be the added determination by him that there was a pattern or practice of discrimination and that it is in the national interest.

MR. SMITH: May it please the Court, it seems to me as indicated by his objection that his answer to that would be no. If that is his answer, he can make his answer now. It says assuming that a substantial portion of the food served in the restaurant moved in interstate commerce, if you assume that he says he still can't [fol. 84] say whether he will enforce the law or not, then I think we are entitled to that as a response. I think it is extremely important. I don't know what these other factors we have been talking about are. We have alleged he will enforce it and this is a question to him, "Will you enforce it?"

JUDGE GEWIN: We will sustain as to fourteen.

MR. BARRETT: The 15th Request for Admission is, "That Defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States."

We make the same technical objection to that, that we have already fully, I think, responded to in our briefs and that is the proper place. It is purely a legal question.

JUDGE GEWIN: Sustain.

MR. SMITH: May I address myself to that?

JUDGE GEWIN: Oh, excuse me.

MR. SMITH: Of course, we have alleged in the complaint that one of the justicible issues in this case is that we say the Act is unconstitutional when applied to these plaintiffs or their restaurant and we deal with the [fol. 85] question whether or not they have differing views and we are frank to say that we have always asserted that they have differing views—

JUDGE GEWIN: As indicated by the papers they filed.

MR. SMITH: I would think so and I don't think the briefs fully take advantage of it but we make no further point of it because we assume, according to our stipulation, that the entire legislative history will be available and we call the Court's attention to the places where they argue that.

JUDGE GWIN: That is all of them, I believe.

MR. SMITH: Yes, sir. May we have the answer to No. 11?

JUDGE LYNNE: the answer has been orally stated and will be later reduced to writing. The reporter has it, I believe.

MR. SMITH: It is the policy to enforce that Act?

JUDGE LYNNE: Yes, sir.

MR. SMITH: Can we stipulate that will be the answer that will be filed in writing later, Mr. Barrett?

MR. BARRETT: Yes, sir.

MR. SMITH: May we proceed?

[fol. 86] JUDGE GEWIN: Yes, sir.

MR. SMITH: I don't know whether this Court cares for an opening statement but I would be glad to go ahead with the evidence or whatever procedure the Court—

JUDGE GEWIN: We are ready for the evidence.

MR. SMITH: Mr. McClung, Sr.

OLLIE McCLUNG, SR.,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. SMITH:) Mr. McClung, I am going to ask you to answer all of these questions so that someone standing over by the door can hear you. You will have to speak out because the reporter can't take down a nod of your head.

This is Mr. Ollie McClung, Sr.?

A Yes, sir.

Q Where do you live?

A 5 Woodhill Road, Mountain Brook.

Q Jefferson County?

A Yes, sir.

[fol. 87] Q Where do you have your restaurant?

A 902 - Seventh Avenue, South, Birmingham.

Q How long have you been at that location?

A My father started in business in 1926.

Q And tell us how the business has been handled within the family since that time.

A Well, my father operated it until 1937 at which time I became a junior partner with him. He died in 1941 and at that time I became the proprietor and operated it myself until 1958, when my son, Ollie, Jr., became a junior partner with me in the business.

Q Which he is today?

A Yes, sir.

Q A junior partner today?

A Yes, sir.

Q The business has been in your family since 1926?

A Yes, sir.

Q Has it been at the same location all the time?

A It started on Sixth Avenue, South, and Goldwire Street in 1926 and moved July 1927 to the present location.

Q And you have been in the same location since that time?

[fol. 88] A Yes, sir.

Q Tell the Court if you will, please, sir, something about the location and character of the neighborhood in which your restaurant is located?

A The principal location is in the colored residential and light industry section of Birmingham. We have several colored schools, several colored churches, and one backs up to my property, a large colored church. All of the residential section is colored.

Q And any residential property in that immediate area is colored property, is that right?

A Yes, sir.

Q What is on the east side of your property?

A The east side is colored residential homes.

Q And on the west side ?

A The west side is light industrial, Daniel's Construction Company, Standard Oil Company, and those businesses.

Q I believe Ingall Iron Works is two or three blocks away?

A Yes, sir.

Q Now, you say there are schools in the immediate [fol. 89] neighborhood?

A Yes, sir, within several blocks of my place.

Q White or colored?

A Colored schools.

Q Now, how far is your restaurant from the nearest interstate highway?

A Eleven blocks.

Q And your restaurant is on Seventh—

A Ninth Street.

Q Ninth Street, and the nearest interstate highway is on 20th Street?

A Yes, sir.

Q I believe there as a State of Alabama Highway that goes by your restaurant, and where does that end?

A I believe it begins at 20th Street and Sixth Avenue, South, or Seventh Avenue, South, and goes to the 31 Highway.

Q Goes to 31 Highway?

A Yes, sir.

Q What is the number of that road?
A 149.
Q And that is not ar interstate road at all, is it?
A I don't believe it goes out of the county.
[fol. 90] Q It stays in Jefferson County entirely?
A Yes, sir.
Q It isn't an alternate interstate?
A No, sir.
Q How far is the nearest railroad station from your place of business?
A About eighteen or twenty blocks.
Q That would be the—
A The L & N Station.
Q How far is the nearest bus station?
A Some four more blocks. Twenty-two blocks. Fourth Avenue and 19th Street.
Q How far is the nearest airport from your place of business?
A Six or eight miles or maybe further.
Q In other words, on the other side of Birmingham?
A Yes, sir, completely across town.
Q Tell us, if you will, something about the nature of your restaurant business, what kind of food you serve and the type of service provided, and something about the parking area if there is any.
A The type of food we serve is barbecue and homemade pies and beverages, non-alcoholic beverages, would [fol. 91] account for ninety percent of our sales or ninety-five percent of our sales.
Q Barbecue, homemade pies, and beverages, non-alcoholic beverages would cover ninety-five percent of your business?
A Yes, sir.
Q Do you serve alcoholic beverages at all?
A No, sir.
Q What is the type of trade to which you cater?
A We cater entirely to business people and family trade.
Q Have you in the almost forty years you have been in business there, have you at any time served Negroes?
A No, sir. Not on the premises.

Q Do you—have you had the practice of selling them food to be taken away from the premises?

A Yes, sir, we continue to serve them take-out food.

Q Now, how many people will your restaurant seat?

A Approximately 220 full capacity.

Q That is if every table has all the people it will take you can seat about 220?

A Yes, sir.

Q Do the majority of the people that come to your [fol. 92] restaurant walk there or come by automobile?

A The large majority by automobile.

Q How many parking spaces does your property afford?

A On my property 92 places besides the street and other parking around.

Q You can have at least one hundred automobiles there?

A More than that, yes, sir.

Q Do you work there yourself?

A Yes, sir.

Q What do you do at the restaurant?

A I do all types of work there at different times. Do cooking of the meat, wait on customers, and cashier on occasion.

Q You prepare the food?

A Yes, sir.

Q And serve the food?

A Yes, sir.

Q You know a great many of your customers personally?

A A great majority of them, yes, sir.

Q You would know them by name or by face?

A By face mostly.

Q What advertising, if any, has your business done [fol. 93] in the time it has been in business?

A We have no advertising program at all. We do no advertising.

Q Do no advertising?

A No, sir.

Q You have any signs out on the highway or out in any public place?

A No signs anywhere off of our property right there.
Q The only sign you have is on your property?
A Yes, sir.
Q You ever run ads in the newspapers?
A No, sir.
Q Have you ever placed signs in hotel or motel rooms?
A No, sir.
Q Have you in running your restaurant, has any effort been made to attract transient people or travelers?
A No, sir.
Q In your judgment, have you attracted any transient people or travelers?
A Not to my knowledge, sir.
Q About what is the total gross sales of your busi-
[fol. 94] ness annually?
A This past year around $350,000.
Q By the past year, what do you mean?
A The past calendar year.
Q Beginning when?
A January 1, 1963, through December 31, 1963.
Q The calendar year of 1963?
A Yes, sir.
Q You did about $350,000 worth of gross sales?
A Yes, sir.
Q And approximately how many meals is that?
A Over half a million. Over 500,000. 536,000, I believe.
Q You have the records in court here showing the figures on your business?
A Yes, sir, I have them over there (indicating).
Q Mr. McClung, do you attract the type of trade that comes in once a month or twice a month or do many of your people come in daily or frequently?
A The majority of my customers come in daily.
Q So of that 536,000 meals you probably serve a whole lot less people than that.
A Oh, very much so.
[fol. 95] Q Substantially less than that?
A A very substantial amount less than that.

Q What was the total amount spent by your restaurant in the twelve months that ended July 1st of this year, that is July 1, 1963, through July 1, 1964, approximately how much food was purchased by that restaurant?

A Approximately $150,000 worth.

Q Where was that food bought?

A It was all bought from local houses, meat houses and grocery houses and paper goods.

Q and, of course, that doesn't include any labor or overhead?

A No, sir, food purchases.

Q An affidavit has been filed today that shows you purchased from George A. Hormel Company, I believe, $69,783.00 worth of meat, is that correct?

A Yes, sir.

Q Of course, you, of your own knowledge, have no way of knowing where that meat comes from?

A No, sir.

Q Is that the principal source of your meat purchases?

A I buy the large majority of my meat there, yes, sir, [fol. 96] eighty or ninety percent.

Q That represents eighty or ninety percent of your meat purchases?

A Yes, sir.

Q I take it then meat is by far the majority of your purchases?

A I believe about eighty-five thousand of the one hundred and fifty thousand is meat.

Q In other words, that is getting up to about—

A About fifty-five percent.

Q About fifty-five percent of your total purchases is meat, and eighty-five percent of that has been purchased from Hormel Company?

A I would think so, yes, sir.

Q Where do you place your order for that meat?

A The salesman works me directly. I give the local salesman the order for the meat.

Q The local salesman comes to your place of business?

A Yes, sir.

Q And you give him the order?

A Yes, sir.
Q Where are you billed?
A I am billed from the Birmingham office of Hormel
[fol. 97] & Company.
Q Where do you pay?
A I pay the local salesman.
Q Cash?
A No, by check.
Q But you pay him personally?
A Yes, sir.
Q Where is the meat delivered to you from?
A From the local Hormel office.
Q This meat, is there anything about this meat that is unusual as related to your restaurant?
A No, all standard cuts.
Q Standard barbecue cuts?
A Yes, sir.
Q Mr. McClung, I believe you have got the figures. Tell the Court what was your daily average gross sales last year. Have you computed that?
A I have them down but I believe $1,035.00 or something of that nature.
Q Have you determined from your books by taking your expenses and your costs, what would be your break-even point in daily sales?
A I believe it was $970.00. I can give you the exact
[fol. 98] figures if you want them.
Q I think we should have them.
I would like the record to show that Mr. McClung now has his account book with him.
A The average sales per day, 1963, $1,139.00. Average costs per day for all expenditures, $939.00, which doesn't include any compensation for the partners.
Q If your daily sales were reduced by $200.00, you would be at the break-even point approximately?
A Yes, sir.
Q And if it was reduced $300.00, you would lose approximately $100.00 a day?
A Yes, sir.
Q Were you aware of the adoption of the Civil Rights Act of 1964 when it was signed by the President?

A I was aware of it. I wasn't informed by anyone other than just common knowledge.

Q You picked it up by the radio or television?

A Yes, sir, and the restaurant association.

Q Did you at any time after that—I believe it went into effect on July 2nd. At any time after that did you have any Negroes come to your restaurant and apply for service?

A Yes, sir.

[fol. 99] Q Approximately when was that?

A July 3rd.

Q How many came?

A Two came and when we refused them they left and came back with four more. Six total.

Q Young or old?

A They were young, two of them particularly.

Q And the other four were middle-aged?

A My son handled the situation there. I wasn't there at that time and he can give you the exact details.

Q You were not there?

A No, sir.

Q At any time since then have you been present when any Negro people came in seeking service?

A Yes, sir.

Q When was that?

A Some three or four weeks ago.

Q Since this suit was filed?

A I don't know.

Q The suit was filed on the 31st, I believe, of July?

A Yes, since the suit was filed we have had several [fol. 100] occasions.

Q Have you declined to serve them?

A We have declined to serve them, sir. Serve on the premises. We offered to serve them take-out service and when they refused that we declined service.

Q Were they declined service because they were Negroes?

A Yes, sir, I would think so. Because we chose not to serve them.

Q Let me go back just a minute and ask you to tell the Court, please, the approximate amount of your investment in that business out there in dollars?

A At my cost or today's market value?
Q Better stick to your cost.
A We have something over $200,000 in actual cost invested.
Q Do you have the annual net profits after paying salaries and so forth?
A Yes, sir, I think so.
Q What is that?
A For the past calendar year?
Q Yes.
A The profits before the partners' compensation was [fol. 101] around fifty or $55,000.
Q Without any compensation for you and your son?
A Yes, sir, and after compensation to the partners something over $30,000 was left for distribution.
Q Based on that do you have any judgment as to the value of your business as a going concern?
A Sir, I wouldn't sell it for less than $250,000 or $300,000 for the business itself not counting the property.
Q Do you consider that the value of it?
A In my judgment, it is worth that much, yes, sir.
Q Now, so your restaurant hasn't at any time served Negroes?
A Not on the premises.
Q Are you familiar with restaurants that have, since July 2, of this year, served Negroes?
A Yes, sir.
Q Are you familiar with whether that had any effect on their business?
A Yes, sir, I think so
Q Tell the Court what that effect has been?
A The Britling's downtown has lost 25 percent of their business. Several restaurants in Atlanta I have [fol. 102] heard from have lost a good deal of the business and in Memphis, Tennessee, where I had some direct connection with people, I understand they lost a lot of business when they integrated.
Q Of course, Britling's is downtown Birmingham?
A Yes, sir.
Q You are referring to downtown restaurants?
A Yes, sir.

Q Your restaurant is located in an industrial—light industrial and Negro neighborhood, is that right?

A Yes, sir.

Q Do you have any judgment whether your restaurant would be affected more or less or about the same as the downtown cafeterias?

A I would think extremely more.

Q For what reason?

A Because of our location principally with some 1500 or 2,000 high school children passing there everyday.

Q Negro children?

A Yes, sir, and with the churches that are close by and the number of Negro children that are connected with the church, of course. I am assuming it would [fol. 103] damage my business 75 or 80 percent, sir.

Q That would be your judgment?

A Yes, sir.

Q You and your son, part of your duties there is to serve customers the food they eat, that is placed before them?

A Yes, sir.

Q And you take their orders?

A Yes, sir.

Q If you were required to serve Negro customers, would you do so voluntarily?

A No, sir.

Q Is that your own judgment, Mr. McClung, or your own decision?

A Yes, sir, I would refuse to serve a drunken man or a profane man or a colored man or anyone who I felt would damage my business and I run a good, clean place there.

Q By the way, your restaurant isn't open on Sunday?

A No, sir.

Q Open six days a week?

A Yes, sir.

Q Do you have employees there who serve the public [fol. 104] who have indicated they would not voluntarily serve Negroes?

A Yes, sir, I think so.

Q Tell us whether you have or not.

A Yes, sir, they have intimated to me they would not voluntarily serve them.

Q Have you had any that said that?

A Yes, sir.

JUDGE GROOMS: How many employees do you have?

A Thirty-six, sir.

JUDGE GROOMS: White or colored?

A Twenty-six colored and ten white.

Q There have been occasions, Mr. McClung, when you have refused service to people other than colored people?

A Yes, sir.

Q Have you ever called upon the law enforcement officials or the Police Department to eject people from your restaurant?

A Yes, sir, on occasion we have, sir.

Q I am not talking about colored people but white people?

A Yes, sir, even after we served them we have asked [fol. 105] them to leave and not take their money.

Q By the way, you don't serve—you don't serve alcoholic beverages there but do you allow anyone to consume alcoholic beverages?

A No, sir, we do not.

Q Do you serve anyone you have reason to know who has consumed alcoholic beverages?

A No, sir, if we can tell they have been drinking we don't serve them.

Q Have you asked people not to come in?

A Yes, sir.

Q What about people who use profanity in your restaurant, how do you handle that?

A We asked them to leave, sir.

Q You have any other method of dealing with profanity?

A Yes, sir, we have little signs that we put on tables and when that occurs if they do not respect that, then we ask them to leave.

Q Do you have a sign with you?

A Yes, sir, I have one.

MR. SMITH: I don't know it is necessary, may it please the Court, to offer this as an exhibit, but we [fol. 106] would like him to read the sign, what is on it.

A The sign states, "No Profanity, Please. Ladies and Children Are Usually Present. We appreciate Your Cooperation."

Q Mr. McClung, did you reach the decision after July 2 of this year not to serve Negroes as your own independent voluntary decision, or were you influenced by any public officials?

A No, we reached the decision before July 2nd. We reached it several days before on our own. We had no other influence.

Q Is it a fact that most of the restaurants in Birmingham, Alabama have served Negroes since July 2 of this year?

A Yes, sir, I think the large majority.

Q And at any time in your restaurant have you been influenced in any way whatever in making this decision by any state or local official?

A No, sir.

Q Mr. McClung, I believe you said you and your son are partners. Do you actually have a partnership agreement?

A Yes, sir.

[fol. 107] Q In making your determination or decision you would not comply with the Civil Rights Act after July 2nd, did you take into consideration the responsibility to your customers?

A Yes, sir, very definitely.

Q Explain that.

A We consider that we operate our business as a trust to our customers, we are a steward of it, and it is our feeling that they have a place to come in and eat where they will enjoy and where they will leave in a better frame of mind than when they came in, that they will get good food and good service. If we fail to do that we feel like we have failed to fulfill our obligation and we don't deserve their business if we don't give them that kind of atmosphere. And to

do that we feel like it is absolutely essential that we control our clientele.

Q To some extent your restaurant has something of a religious atmosphere?

A Yes, sir, we try to make it so.

Q I don't mean that you have hymn singing but you have signs relating to religion?

A Yes, sir.

[fol. 108] Q Are you in any way connected with a church?

A Yes, sir.

Q What church?

A I am a member of the Cumberland Presbyterian Church; I have been an elder in the church, church treasurer, and Sunday School teacher, and I now teach a Sunday School Class and I have been on the Presbyterial Boards and Synodic Boards and our General Assembly Board and one time I was Moderator of our Church.

Q Over what area?

A Over the entire denomination.

Q The entire denomination of the Presbyterian Church?

A Cumberland Presbyterian Church, yes, sir.

Q Are you sometimes referred to as a lay minister?

A Well, some people call me a lay preacher, yes, sir.

Q I believe I asked you the percentage of the total purchases of food that was meat.

A Yes, sir.

Q The only meat you serve is barbecued meat?

A Yes, sir.

Q By the way, your restaurant is known as Ollie's [fol. 109] Barbecue, is that correct?

A Yes, sir.

Q You told us about $150,000 worth of food was sold or purchased in the past year and you told us that meat represented about 55 percent of that?

A Yes, sir.

Q And about 80 or 85 percent of that meat was bought from Hormel Company. If you will, who did you buy the other meat you purchased from?

A I buy in small amounts from Swift & Company, and Rath Packing Company.

Q I believe both are national companies?

A Yes, sir, they have local houses.

Q You buy from the local house?

A Yes, sir.

Q Now, the other food, from whom do you buy that generally?

A Most of it is groceries from Wood-Fruitticher Grocery Company, and produce from Carlisle Brothers Produce Company.

Q Those are both local companies?

A Yes, sir.

Q And your buns and your bread?

[fol. 110] A From Rutland Baking Company, a local baker.

Q You wouldn't know of your own knowledge the amount of produce that comes in from out of the state, I suppose?

A No, sir.

Q You buy directly from Wood-Fruitticher?

A Yes, sir.

Q Do you receive any food that is delivered directly to you from out-of-state points?

A No, sir.

Q Your food comes to you from local houses that you buy from and tell us whether that is a warehouse.

A No, sir, it is a local distributorship, I suppose.

Q They have a place of business here where they receive—

A It is stored here.

Q That meat is ordered specifically for you?

A No, sir.

Q In other words, they supply your needs from their general supply, is that correct?

A Yes, sir.

MR. SMITH: I believe that is all.

[fol. 111]

CROSS EXAMINATION

Q (BY MR. BARRETT:) Mr. McClung, do you personally supervise the employees who work in your restaurant?

A Yes, sir, I and my son jointly.

Q The two of you give them their direction as to how to carry out the work and what work to do?

A Yes, sir.

Q And you expect them to carry out those directions?

A When they are reasonable, yes, sir.

Q And they do carry out your directions, is that right?

A Not as well as I would like them to but they do, yes, sir.

Q What measures do you take if any employee regularly fails or refuses to carry out your directions?

A We would dismiss them.

Q You have testified that you do not in the restaurant serve intoxicated persons, is that correct?

A That is correct.

Q You do not serve anyone who is disorderly, is that correct?

A That's right.

Q Or anyone who is unclean?

A Well, I don't think I made that statement.

[fol. 112] Q I thought you said something about a clean place.

A I don't recall anything like that.

Q I might have misunderstood you there.

A We have served working men in overalls at times.

Q And you do not serve Negroes?

A No, sir, not on the premises.

Q And you have given directions to your employees with regard to these various standards, who they should serve and should not, is that correct?

A Yes, sir.

Q You do not leave it to the employees, each individual to decide what type of person he should serve or not, is that correct?

A I expect him to determine that to some extent, yes, sir.

Q Under the standards you have laid down, is that correct?

A Yes, sir.

Q Are particular areas in the restaurant assigned to particular employees?

A Yes, sir.

Q So that if a person—a customer sits down at a particular table, a particular employee is expected by [fol. 113] you to serve that person, is that right?

A Yes, sir, that is correct.

Q And if it is a white customer apparently orderly and not intoxicated, you would expect the employee to serve that person, is that correct?

A Yes, sir.

Q And to serve that person in a manner that is fitting and comports with your standards of service to the general public?

A Yes, sir.

Q If an employee consistently fails to do that, you would discharge the employee, is that correct?

A I would think so.

Q How many employees do you have?

A Thirty-six, sir.

Q How many wait the tables?

A About eleven.

Q Eleven wait tables?

A Yes, sir.

Q Are the employees who wait tables men or women?

A All are colored girls except one. I have one white man.

Q With that exception, though, all the table service [fol. 114] is performed by colored women, is that correct?

A Yes, sir.

Q You have mentioned that you sell food to Negroes to eat off of the premises, is that correct?

A Yes, sir.

Q Where does the customer go in the restaurant to purchase food to carry out?

A We have two places for take-out service for white and two for colored take-out service.

Q Where are the places for white take-out service?

A On the counter adjacent to the cashier.
Q Where is the colored take-out?
A At the end of the service counter.
Q Incidentally, do your employees eat on the premises?
A Yes, sir, most of them.
Q White and colored?
A Yes, sir.
Q Where do they eat?
A The colored have their own room they eat in and the white eat in the dining room.
Q Do you have private dining facilities for the general public?
[fol. 115] A No.
Q Do you have more than one dining room?
A I have two rooms adjacent with an opening in between. No enclosure between them.
Q Is the second dining room available for private parties?
A Well, we can serve a group of people but it is never closed off, no, sir. There is no way to close it off.
Q But a person or a group can reserve it?
A Ususally after closing time after 7:30 or 8:00 o'clock after we are through serving the public.
Q Mr. McClung, have you been contacted by any representative of the Federal Government in connection with compliance with the Civil Rights Act?
A No, sir.
MR. BARRETT: I have no further questions.

REDIRECT EXAMINATION

Q (BY MR. SMITH:) I believe you said you had eleven people waiting tables. Do you have facilities at your counter, service counter, for people to sit and eat?
A Yes, sir, we have fourteen counter stools.
[fol. 116] Q Fourteen counter stools. I direct this question direetly to the counter service.
Are those eleven you told us about a moment ago the only ones that serve on the counter?
A Only two of those would serve on the counter.
Q Who else would serve on the counter?

A Whoever is back there. I do sometimes and my son does and different ones back there.

Q The cashier ever serve?

A On occasions.

Q All of that would be additional to those eleven people?

A Yes, sir.

Q The counter service wouldn't be the same people?

A No, sir, except with the exception of two.

MR. SMITH: I believe that's all.

(Witness Excused)

MR. SMITH: We will call Mr. McClung, Jr. at this time.

MR. OLLIE McCLUNG, JR.,

being duly sworn, was examined and testified as follows:

[fol. 117]

DIRECT EXAMINATION

Q (BY MR. SMITH:) Is this Mr. Ollie McClung, Jr.?

A That is correct.

Q You live in Birmingham?

A That is correct.

Q This restaurant that you and your father operate as a partnership, that is in Birmingham?

A Yes, sir.

Q Do you recall the occasion sometime about July 3, 1964, when you were at the restaurant and some colored people came into the restaurant for service?

A Yes, sir, I do.

Q Will you tell the Court about that, please?

A This is during our evening meal, the supper hour, I don't remember the exact time but approximately 6:30 we were relatively busy and two young colored people came in, approximately college age, a girl and a boy. I retract that. A boy came in by himself first. He came up to the counter and told the girl waiting on the counter that night, she asked him what he would like and he would not give her his order but wanted to speak with

the manager, and I was there at the time and she called me over. He asked me would I serve him and I said [fol. 118] if he would step around to the side where the colored take-out counter was the girl would take his order. He seemed actually not to be interested in being served because he never even sat down and he tapped on the counter and asked could he be served here, right at the counter, sit down and eat, and I said, no, that was not our policy and he left.

Approximately forty-five minutes later he came back this time with the young girl that I mentioned and four other colored people, older. They again—they didn't ask anything but rather came in and sat at the counter. Even though it was rather obvious he was aware what the policy was, they came in and sat at the counter and one white young person was sitting at the counter, a boy, and he got up and left the minute they sat down and I went over to them, the girl and boy were obviously part of the professional or paid Civil Rights agitators—

Q You can't tell about that. Anything you saw or heard.

A They had a card and they wanted to know why we did not serve them and this sort of thing, and they filled out the card and wanted to know my name and [fol. 119] address of the place.

Q They were taking notes with pen and pencil?

A Yes, sir, that is correct. And after a couple of minutes I told them that I was sorry that they would have to leave, that it wasn't our policy to serve them there and they got up and left.

Q And there was no threatening on either side?

A That is correct, they got up and left.

Q What has been the behavior and demeanor of your employees since July 2nd? Has it been good bad or indifferent?

A For the most part I can't tell it is greatly changed or different.

Q Has there been any change since this suit was filed?

A Not that I can tell, no, sir.

Q What number of your thirty-six employees are colored people?

A About twenty-five or twenty-six are colored.

Q Have you noticed any change in them at all as a result of this case?

A No, I haven't.

MR. SMITH: I believe that's all.

[fol. 120] MR. BARRETT: No questions.

(Witness Excused).

MR. SMITH: May we have a second, Your Honor? May we call Mr. McClung, Sr. back just a moment?

MR. OLLIE McCLUNG, SR.,

having been previously sworn, was examined and testified further as follows:

REDIRECT EXAMINATION

Q (BY MR. SMITH:) Mr. McClung, the records of this court shows that this suit was filed on July 31, 1964, which I believe was Friday. Is it your recollection this suit was filed on Friday?

A Yes, sir.

Q Did anything occur shortly before that date that in any way influenced your decision in bringing this suit?

A Yes, sir, very definitely.

Q What was that?

A The injunction obtained by the Attorney General against the group of restaurants in Tuscaloosa.

Q I believe the record of the court shows that there has been no injunction but suit was filed.

[fol. 121] A Yes, sir, suit filed by the Justice Department.

Q Do you know what date that was?

A Yes, sir, I think it was Wednesday before this suit was filed the 29th of July.

Q When did you first consult me or Mr. Somerville or Mr. Faulkner in this case?

A As far as filing the suit, the day after that.

Q After the Tuscaloosa case?

A Or that day. Very soon.

Q It wasn't before the Tuscaloosa suit was filed?

A No, sir, I don't believe I talked to you about it before then.

Q You had known me before?

A Yes, sir.

Q Had we ever represented you before?

A No, sir.

Q Either the day of the Tuscaloosa suit or the day after the Tuscaloosa suit was filed?

A Yes, sir.

Q Are you telling the Court the filing of that suit was one of the factors that influenced you to bring this suit?

A It was the important factor, sir, because I felt [fol. 122] like if I were grouped with Howard Johnsons and Holiday Inn and other restaurants of that nature that I would have no opportunity at all to present my case as a local restaurant.

MR. SMITH: That's all I have, you may come down.

MR. BARRETT: No questions.

(Witness Excused)

MR. SMITH: May I ask Your Honor a question that I believe answers itself? I assume that all the records of this court in the Tuscaloosa case are before the Court and the Court take judicial notice of that record. If there is any question about it we would like to offer the records in the Tuscaloosa case.

MR. BARRETT: We object to it as incompetent and irrelevant.

JUDGE LYNNE: It is not necessary to encumber the record. We will take judicial notice of the records.

MR. SMITH: Not only the file but also the averments and pleadings in the case?

JUDGE LYNNE: Yes, sir.

MR. SMITH: Plaintiff rests.

May we make the further comment that this matter [fol. 123] is set today only on the action for permanent injunction, and we, of course, hope on the trial of this case on the merits that we might go into additional matters. We assume the defendants would go into additional matters.

On the application for injunction we rest at this time.

JUDGE LYNNE: You have any evidence?

MR. BARRETT: No, we have no evidence.

JUDGE GEWIN: We will recess until 1:15 at which time we will come back and hear from each side and we will allot one hour for each side.

MR. SMITH: That includes argument on the motion?

JUDGE GEWIN: All argument that you have unless you think you need more time than an hour.

MR. BARRETT: No, sir.

MR. SMITH: I have no way of judging it. We hope to have time to convince the Court we are right.

JUDGE LYNNE: We would like to hear arguments, of course, on the justicibility of the issue presented by the plaintiff in the case.

MR. SMITH: We assume that we would start with our case and—

[fol. 124] JUDGE LYNNE: We have, it seems to me, several things we want to hear about. Whether or not the Act itself, Title II of the Act, the only part we have, whether it is unconstitutional as being beyond the power of the national Congress, in which event I think the issue of justicible issue would be greatly narrowed. I would like to hear from the parties on those issues.

MR. SMITH: Thank you.

(The Court was in recess from 11:30 a.m. until 1:15 p.m.)

JUDGE LYNNE: Gentlemen, does either side desire to have the oral argument recorded by the court reporter?

MR. BARRETT: No, sir.

MR. SMITH: No, sir.

[fol. 125] REPORTER'S CERTIFICATE
[Omitted in Printing]

[fol. 126] CLERK'S CERTIFICATE
[Omitted in Printing]

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

OLLIE McCLUNG, SR., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Alabama (Appendix A, *infra*) is not yet reported.

JURISDICTION

On September 17, 1964, the three-judge district court declared unconstitutional that part of the Civil Rights Act of 1964 (P.L. 88-352, 78 Stat. 241) which prohibits racial discrimination by any restaurant "if a substantial portion of the food which it serves * * * has moved in commerce" (sections 201(a), (b)(2), (c)(2)), and enjoined the Attorney General and his

745-696—64——1

subordinates from enforcing the Act against appellees' restaurant. A notice of appeal to this Court was filed on September 17, 1964. By order of Mr. Justice Black, dated September 23, 1964, the injunction has been stayed.

The jurisdiction of this Court to review the decision of the district court is conferred by 28 U.S.C. 1252 and 1253.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, sec. 8, cl. 3, and Section 201 of Title II of the Civil Rights Act of 1964 (P.L. 88–352, 78 Stat. 243) are reproduced in Appendix B, *infra*.

QUESTIONS PRESENTED

1. Whether the complaint should be dismissed for want of equity jurisdiction.

2. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it prohibits racial discrimination by a restaurant "if * * * a substantial portion of the food which it serves * * * has moved in commerce."

STATEMENT

On July 31, 1964, appellees, who operate a restaurant located in Birmingham, Alabama, filed a complaint

[1] Section 1252 authorizes a direct appeal from an interlocutory or final judgment holding an act of Congress unconstitutional. Section 1253 authorizes an appeal to this Court from an interlocutory or permanent injunction entered by a three-judge court. The decree herein is an interlocutory judgment or injunction, rather than a temporary restraining order; it is not limited to ten days (see F.R. Civ. Proc., Rule 65(b)), but is to continue in effect until further order of the district court.

in the district court challenging the constitutionality of the Civil Rights Act of 1964 insofar as it prohibits racial discrimination or segregation by restaurants. The complaint sought an injunction restraining the Attorney General and his subordinates from enforcing the Act against appellees' establishment. On August 4, 1964, pursuant to 28 U.S.C. 2282, a three-judge district court was designated to hear and determine the case. Appellants moved to dismiss on August 19, 1964, and the case was heard on September 1, 1964. On September 17, 1964, the court denied the Government's motion to dismiss, declared the challenged provisions unconstitutional as applied to appellees' restaurant, and granted appellees' prayer for a preliminary injunction.

The gravamen of the complaint is that appellees' business is "essentially local in character." Appellees alleged that all of their food purchases are made "within the State of Alabama;" that the operation of the restaurant "in no way affects commerce" despite the fact that "some of the food served by [their restaurant] probably originates in some form outside the State of Alabama;" and that the restaurant does not serve interstate travelers. The complaint claimed that, as applied to appellees, the Act was unconstitutional, in that it exceeded the power of Congress to regulate commerce among the several states; deprived appellees of property without due process of law contrary to the Fifth Amendment; subjected them to involuntary servitude prohibited by the Thirteenth Amendment; was "in contravention of natural law;" and violated

the Tenth Amendment. An amendment to the complaint raised the additional objection that the statute contravened appellees' rights guaranteed by the First Amendment. It was further claimed that a genuine threat existed that, unless enjoined and restrained, the Attorney General would seek to enforce the Act against appellants to their irreparable and serious injury, in an amount far in excess of $10,000.

The government's motion to dismiss asserted that no "case or controversy" was presented within the meaning of Article III of the Constitution; that appellees were not threatened with any injury sufficient to justify the exercise of equity jurisdiction; that appellees had an adequate remedy at law by way of a defense to any enforcement proceeding which might be brought against them under Title II of the 1964 Act; and that, in any event, the Act is constitutional.

The holding of the district court that the challenged provision was invalid was premised upon its view that, although a substantial portion of the food served by the restaurant is obtained through interstate channels, it comes to rest before being sold by the restaurant and hence is no longer subject to federal regulation under the Commerce Clause.

THE QUESTIONS ARE SUBSTANTIAL

The issues presented by this appeal are of obvious importance.

The threshold issue is whether equity jurisdiction may be invoked in the absence of enforcement proceedings to draw in question the validity of this

federal statute at the instance of any proprietor who might be covered by its terms, despite the fact that neither criminal prosecution nor money damages are provided for in the Act and there is accordingly no threat of any legal injury.

The second issue is the constitutionality of a statute which has undeniable significance for the Nation and was enacted at "the culmination of one of the most thorough debates in the history of Congress." Mr. Justice Black, opinion denying application for a stay, *Heart of Atlanta Motel* v. *United States,* O.T. 1964, August 10, 1964.

In granting a stay of the district court's injunction entered in the instant case, Mr. Justice Black declared that the issues are "important" and that "their final determination should not be unnecessarily delayed." He also indicated that the Court is prepared to set the case down for argument immediately following the related *Heart of Atlanta* case, which is scheduled to be heard on October 5, 1964. We believe it unnecessary in these circumstances to labor the obvious proposition that the case is one of high importance and merits plenary consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1964.

APPENDIX A

In the United States District Court for the Northern District of Alabama, Southern Division

Civil Action No. 64-448

OLLIE MCCLUNG, SR., AND OLLIE MCCLUNG, JR., PLAINTIFFS

vs.

NICHOLAS DEB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the defendant, Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America, and his agents, servants, employees, successors in office and those in concert with him who shall receive notice of this order, be and they are hereby temporarily restrained and enjoined from enforcing the provisions of title II of the Civil Rights Act of 1964 against plaintiffs, Ollie McClung, Sr. and Ollie McClung, Jr., as partners operating a restaurant under the trade name "Ollie's Barbecue" at 902 7th Avenue South, in Birmingham, until further order of this court.

Done, this the 17th day of September 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

[Caption omitted]

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the motion in behalf of defendants to dismiss the complaint herein be and the same is hereby overruled.

Done, this the 17th day of September 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

[Caption omitted]

Before GEWIN, *Circuit Judge,* and LYNNE and GROOMS, *District Judges.*

PER CURIAM: This is a suit by the owners and operators of a restaurant business in Birmingham, Alabama, seeking to enjoin the enforcement of the provisions of title II of the Civil Rights Act of 1964 [1] on the ground that they are unconstitutional. A statutory three-judge court was convened pursuant to 28 U.S.C.A. § 2282, and the case was set down for hearing on September 1, 1964, on plaintiffs' prayer for a temporary injunction. Prior to the hearing the defendants moved to dismiss the complaint on the separate grounds that (1) the court lacks jurisdiction over defendant Robert F. Kennedy [2] as Attorney General of the United States, because of insufficient service of process; (2) since defendant Robert F. Kennedy is an indispensable party, the insufficiency of service of process upon him renders co-defendant Macon L. Weaver, United States Attorney for the Northern District of Alabama, an improper party defendant; (3) the complaint fails to state a claim upon which relief can be granted; and, (4) the court lacks equitable jurisdiction because plaintiffs have an adequate remedy at law. This motion was heard by and submitted to the full court on briefs and oral argument of counsel on September 1, 1964, and was taken along with plaintiff's prayer for a temporary injunction.

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[1] Public Law 88-352; 78 Stat. 241.

[2] Since Robert F. Kennedy tendered his resignation as Attorney General of the United States, which was accepted after submission of this case to the court and since Nicholas deB. Katzenbach has been appointed Acting Attorney General of the United States, the said Katzenbach is hereby substituted, in his official capacity, for the said Kennedy as a party defendant, as provided by Rule 25(d)(1) Fed. R. Civ. P.

745-696—64——2

THE MOTION TO DISMISS

The first two grounds for dismissal, both based upon the theory that service of process upon the Attorney General was defective, are no longer in issue. Service of process upon the Attorney General was made initially by certified mail in accordance with the provisions of 28 U.S.C.A. § 1391(e), and defendants contended that because fictitious parties were joined as defendants the provisions of section 1391(e) were inapplicable. Thereafter, plaintiffs amended their complaint by striking and dismissing therefrom the unserved fictitious parties and caused the complaint as amended to be re-served upon the Attorney General under section 1391(e). It was conceded by counsel for defendants on argument that the first two grounds in their motion to dismiss were thereby eliminated and accordingly are considered abandoned.

Defendants have also insisted in their brief and oral argument that the complaint does not present an actual controversy between the parties and that the adequacy of legal remedies deprives this court of equitable jurisdiction. These grounds were argued in the hearing on plaintiffs' prayer for temporary injunction at which evidence was adduced developing the undisputed facts set out below.[3]

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[3] 1. Plaintiffs are partners operating a restaurant under the trade style "Ollie's Barbecue" at 902 Seventh Avenue South, in Birmingham.

2. The plaintiffs' family has operated such restaurant under the same name and at the same location since 1927.

3. Plaintiffs' restaurant specializes in barbecued meats and homemade pies; approximately 90 to 95 per cent of its sales consist of such items and nonalcoholic beverages.

4. Plaintiffs' restaurant, when filled to capacity, will seat approximately 220 persons; its trade is derived from local regular customers who are for the most part known to the

Contending that there has not been a sufficient showing of a specific threat of immediate enforcement of title II of the act as to the plaintiffs, defendants insist

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plaintiffs; its trade is predominantly composed of white collar business people and family groups. Plaintiffs feature in their restaurant a wholesome atmosphere in which no profanity or consumption of alcoholic beverages is allowed. The restaurant is closed on Sunday. Plaintiffs have in the past declined service to persons who have been profane and have given the appearance of drinking alcoholic beverages.

5. Plaintiffs' restaurant is located in an area of Birmingham in which are located primarily residences occupied by Negroes and light industrial development; in the nearby vicinity are several Negro churches and schools attended by Negro children.

6. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad station and bus station and between six and eight miles from the nearest airport.

7. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

8. In the twelve months preceding the passage of the Civil Rights Act of 1964, plaintiffs purchased approximately $150,000 worth of food, all locally. Approximately 55 per cent of this was for meat and between 80 and 90 per cent of the meat purchases were from George A. Hormel & Company, at its Birmingham branch. Its purchases from Hormel for that period were shown to be $69,783. All of the meat purchased from Hormel was shipped to its Birmingham branch from outside the State of Alabama.

9. Plaintiffs employ 36 persons at their restaurant, approximately two-thirds of whom are Negro. Plaintiffs personally prepare food and serve customers. Plaintiffs and some of their employees would not voluntarily serve meals to Negroes.

10. Since July 2, 1964, plaintiffs have not complied with the Civil Rights Act of 1964; they have, in fact, on more than one occasion, refused service to Negroes on an equal basis with

alternatively that it is not alleged that defendants either have instituted enforcement proceedings against the plaintiffs or have conducted an investigation to determine whether plaintiffs have violated the act, and that insufficient facts are alleged to bring the plaintiffs within the coverage of the act.

In urging that the allegations are insufficient to show coverage, defendants point first to averments in the complaint respecting the remoteness of plaintiffs' business from any place normally frequented by interstate travelers, the absence of any advertising by them and the averment that to their knowledge they serve no "interstate travelers" as that term is used in the act. It is true that these allegations, substantiated by evidence at the hearing, tend strongly to indicate an absence of coverage under title II insofar as it relates to a restaurant which "serves or offers to serve interstate travelers," and defendants have made no contention that they are covered by virtue of that part of the act.

Defendants then seize upon the averment that "some" of the food served in plaintiffs' restaurant originated in some form outside of Alabama. This use of the word "some", say defendants, is insufficient because the act uses the term "substantial" in defining the portion of a restaurant's food which must move in commerce in order that it be within the al-

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white customers and on such occasions plaintiffs have been in actual violation of the act.

11. Because of their location and the manner of conducting their business, plaintiffs would lose a substantial amount of business if forced to serve Negroes in their restaurant. From its beginning, plaintiffs' restaurant has served only white trade.

12. A substantial portion of the food served in plaintiffs' restaurant has moved in commerce and plaintiffs have, since July 2, been in violation of the Civil Rights Act of 1964.

ternative criterion of coverage prescribed by section 201(e)(2). We are of the opinion that the meaning of the term "substantial" as there used must and can only be determined judicially, and we conclude as a matter of law, on the basis of objective evidence, that a "substantial" portion of the food served by plaintiffs has moved in commerce within the meaning of the act.

As defendants note, the complaint avers neither that enforcement proceedings have been instituted against plaintiffs nor that their restaurant was investigated by defendants prior to the commencement of the action. Plaintiffs do aver that prior to its filing they had violated the provisions of title II applicable to their restaurant by refusing to provide service to Negroes on the same basis as they provide to their other customers, and the evidence shows that since its commencement they have consistently continued and will continue thus to violate the act. In this respect alone the circumstances of this case are quite different from those existing in the cases urged by defendants in support of their position that this suit presents no justiciable controversy.

One of the plaintiffs testified further that he was caused in large part to institute this action by the fact that the defendants two days previously had filed in this court an enforcement suit against other persons operating restaurants of a similar character,[4] and it appears from the complaint in that suit that the act's coverage was invoked in part upon the basis that a substantial part of their food had moved in commerce. And plainly the Attorney General has indicated an intention to enforce the provisions of title II as against its violators. We cannot say, in these circumstances, that enforcement against plain-

[4] Civil Action No. 64-443, Northern District of Alabama.

tiffs was not reasonably imminent when this action was commenced, and no case cited by defendants or found by us has held under comparable circumstances that for this reason an actual controversy did not exist.

There are, moreover, many instances in which a threat of imminent enforcement of a law has not been considered requisite to the existence of a justiciable controversy or the exercise by federal courts of equitable jurisdiction in similar suits seeking anticipatory relief from the operation and enforcement of the law.

In their complaint plaintiffs attack the validity of title II of the act in its entirety. The act requires in positive terms that the plaintiffs, in the operation of their restaurant, afford to all persons "the full and equal enjoyment of the goods, services [and] facilities." Consequently, as to the plaintiffs, title II creates a mandatory duty to which it commands immediate obedience. As against this, the plaintiffs contend, and it is the object of this suit to determine, that they have a constitutional right to operate their business free of the restrictions now imposed upon it by the act. They aver, and have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious inpingement upon the plaintiffs' property rights. The existence of a justiciable controversy as well as the equitable jurisdiction of the federal courts and the right to injunctive relief have been unheld often under similar circumstances. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Pub-*

lic Utilities Comm'n of California v. *United States,* 355 U.S. 534 (1958); *Adler* v. *Board of Education,* 342 U.S. 485 (1952); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Terrace* v. *Thompson,* 263 U.S. 197 (1923); *Wickard* v. *Filburn,* 317 U.S. 111 (1942). It is our considered opinion that these decisions are controlling upon the present case and that defendants' motion to dismiss the complaint therefore should be overruled.

THE MERITS

Having negotiated the procedural hurdles, we proceed to an examination of title II of the Civil Rights Act of 1964:

> SECTION 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce,* or if discrimination or segregation by it is supported by State action: * * *
>
> * * * * *
>
> (2) *any restaurant,* cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> * * * * *
>
> (c) *The operations of an establishment affect commerce within the meaning of this title if* * * * (2) *in the case of an establishment de-*

scribed in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, *has moved in commerce.* * * *

(Emphasis supplied.)

Contending that the foregoing portions of the act, as applied to the local business which they operate, are unconstitutional, plaintiffs insist that when private establishments within the confines of the respective states, in the lawful and legitimate exercise of their private discretion, wish to select their customers there is no power, under the Constitution, or any of its amendments, granted to the federal government to regulate such private accommodations.

The heart of the federal compact beats in the tenth amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus it is to the Constitution and its amendments that we must look to determine whether Congress possesses the power it has in this instance sought to exercise.

Insofar as we can determine from a review of the legislative history of the act[5] and the extensive debates in the Senate relevant to title II,[6] the only three suggested sources of congressional power were

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[5] 11 U.S. Code Cong. & Ad. News 1727–1891, 88th Cong., 2d Sess. (July 20, 1964).

[6] V Cong. Rec. 4757, 4593–4598, 4643–4655, 4680–4681, 4833–4835, 4906, 5066–5072, 5091–5104; VI Cong. Rec. 5454–5458, 5539–5543, 5690–5693, 5770–5771; 5851–5855, 5365–5871, 5879–5889, 6003, 6212-6214, 6234–6240; VII Cong. Rec. 6307, 6334–6344, 7039–7041; VIII Cong. Rec. 7552–7558, 7677–7684, 7816–7825, 7837–7854, 7966–7967, 8029, 8092, 8371, 8805–8806; IX Cong. Rec. 8849. (1964).

the thirteenth amendment, the fourteenth amendment, and the commerce clause.

At oral argument counsel for defendants forthrightly stated their opinion that the thirteenth amendment was neither authority for nor prohibitory of this legislation. We agree, thereby rejecting the argument of plaintiffs that the effect of such act is to impose upon them a condition of involuntary servitude in violation of such amendment.[7]

It cannot be successfully contended that the above quoted portions of the act may be constitutionally applied to these plaintiffs under the grant of legislative power contained in the fourteenth amendment[8] since it was conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises. *Civil Rights Cases,* 109 U.S. 3 (1883); *Peterson* v. *Greenville,* 373 U.S. 244 (1963).

In any discussion of the commerce clause as a grant of power to the national government to regulate activities commonly described as private and local we keep in mind the admitted fact that a majority of sincere and conscientious members of Congress believed this legislation to be in the national interest and necessary to end practices which they consider debasing to human dignity. Of course, we express

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[7] *Compare:* Butler v. Perry, 240 U.S. 328 (1916); Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); State v. Sprague, 32 U.S.L.Week 2610 (New Hampshire Sup. Ct. 1964); Scheiber, *The Thirteenth Amendment and Freedom of Choice in Personal Service Occupations: A Reappraisal,* 49 Cornell L.Q. 508 (1964).

[8] Section 5 thereof reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

no opinion as to the wisdom of the legislation and confine our consideration to the constitutionality of the provisions with which we are concerned.

The commerce clause, appearing in article 1, section 8 of the Constitution, reads as follows:

> "The Congress shall have Power * * *
>
> * * * * *
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> * * * * *
>
> * * *—And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

The language is simple and unadorned. It has remained unchanged since 1789. With reference to it, to allay popular misgivings as to the nature and extent of powers vested in the Union by the new Constitution, James Madison wrote, "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[9] And Alexander Hamilton made it clear that the commerce clause was intended to restrain the "interfering and unneighborly regulations of some states."[10] In spite of its simplicity and clarity and because of the constantly increasing "interpenetrations of modern society,"[11] it has spawned thousands of cases.

In *Civil Rights Cases*, 109 U.S. 3 (1883), at page 10, Mr. Justice Bradley characterized section 1 of the Civil Rights Act of 1875: "Its effect is to declare, that in all inns, public conveyances and places of amusement, colored citizens, whether formerly slaves or not,

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[9] The Federalist No. 45 (Madison).

[10] The Federalist No. 22 (Hamilton).

[11] *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 650 (1944).

and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa.*" Thereafter, he posed and answered a question: "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [thirteenth, fourteenth and fifteenth]." Since the commerce clause had been in the Constitution for almost one hundred years and since we are advised that the Solicitor General in brief had urged upon the court the sufficiency of its grant of power to sustain the challenged legislation, Mr. Justice Bradley's pronouncement is, to say the least, highly intriguing and might be accorded more than persuasive authority but for the subsequent statement in *Butts* v. *Merchants Transp'n Co.,* 230 U.S. 126 (1913), at page 132:

> "The question of the constitutional validity of those sections came before this court in *Civil Rights Cases,* 109 U.S. 3, and upon full consideration it was held (a) that they received no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power * * *."

While we shall not attempt the impossible task of a precise delineation of the contours of the power to regulate interstate commerce granted the Congress or the Herculean labor of analyzing the multitudinous cases dealing with various aspects of what may be termed primary and implied power, we shall make an effort to distill from the decided cases a definitive statement of such power which may be applied to this case only.

Some presuppositions are pe[illegible]ssible; indeed they are required by the teaching of *Wickard* v. *Filburn*, 317 U.S. 111, 120, "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195."; of *Swift* v. *United States*, 196 U.S. 375, 398, "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."; of *The Pipe Line Cases*, 234 U.S. 548, 560–61, "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution * * *."; and, of *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Proceeding to explicate our understanding of the nature and extent of the power with which we are concerned, it is quite unnecessary to labor the obvious, that the commerce clause constitutes an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one State to another. The cases are legion sustaining its exercise in this area.[12] Its power

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[12] *E.g. United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U.S. 222 (1955); *Radovich* v. *National Football League*, 352 U.S. 445, 455 (1957); *United States* v. *Frankford Distilleries*, 324 U.S. 293 (1945).

is not restricted, however, to the regulation of interstate commerce. Congress is further invested with the power to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce.

The power of Congress to regulate wholly intrastate activities is brought into play only when those activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from practices within a State which burden its freedom or obstruct its flow.[13] The exercise of such power must necessarily be prospective, for the reason, that, unlike Tennyson's brook, interstate commerce does not run on forever. At some time it must come to an end within the boundaries of some State.[14]

This century has witnessed a dynamic expansion of federal control not only of the movements of commerce between the states but also of intrastate activities which have been found to burden its freedom or obstruct its flow. Thus Congress has exercised its power granted by the commerce clause to enact the

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[13] *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Santa Cruz Co.* v. *NLRB*, 303 U.S. 453 (1938); *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937); *Edison Co.* v. *Labor Board*, 305 U.S. 197 (1938); *Labor Board* v. *Fainblatt*, 306 U.S. 601 (1939); *United States* v. *Darby*, 312 U.S. 100 (1941).

[14] *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824); *Schecter Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Welton* v. *Missouri*, 91 U.S. 275 (1875); *Bowman* v. *Chicago & N. Ry.*, 125 U.S. 465 (1888); *Packer Corporation* v. *Utah*, 285 U.S. 105 (1932); *Florida* v. *United States*, 282 U.S. 194 (1931); *Yonkers* v. *United States*, 320 U.S. 685 (1944); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939).

Robinson-Patman Act,[15] the Federal Food, Drug and Cosmetic Act,[16] the White Slave Laws,[17] the Gambling Devices Transportation Act,[18] the Agricultural Adjustment Act of 1938,[19] the Fair Labor Standards Act,[20] and the National Labor Relations Act,[21] among others.

Concededly, the latter three, in broad extension of federal control, have immediate, direct, and practical impacts upon activities which were at one time considered wholly intrastate in nature thus resting in the domain of state control.

In each instance Congress cautiously made clear legislative findings that the regulation of the intrastate practices dealt with was necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce. In the National Labor Relations Act such findings are set forth in 29 U.S.C.A. § 151. Moreover, assurance was given that regulation of essentially local matters would apply only where there was an actual effect on interstate commerce by requiring that this be determined administratively or judicially on a record in each individual case. 29 U.S.C.A. §§ 159(c) and 160(a). In the Agricultural Adjustment Act Congress made elaborate findings to establish an effect on commerce of the intrastate activities sought to be regulated. 7 U.S.C.A. §§ 1311, 1321, 1331, 1341, 1351, 1357, 1379(a), and 1380.

The Fair Labor Standards Act contains a built-in limitation on its enforcement by requiring a judicial

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[15] 52 Stat. 446 15 U.S.C.A. § 13(c).

[16] 52 Stat. 1040, as amended, 21 U.S.C.A. §§ 301–392.

[17] 36 Stat. 825, as amended, 18 U.S.C.A. §§ 2421–2424.

[18] 64 Stat. 1134, 15 U.S.C.A. §§ 1171–1177.

[19] 52 Stat. 31, as amended, 7 U.S.C.A. §§ 1281–1407.

[20] 52 Stat. 1060, as amended, 29 U.S.C.A. §§ 201–219.

[21] 49 Stat. 449, as amended, 29 U.S.C.A. §§ 151–159.

determination of the ultimate fact that acts of employers or employees actually affect such commerce on a case by case basis.

The Civil Rights Act of 1964 contains no legislative findings and we proceed to a critical examination of its provisions to determine whether it may nevertheless successfully survive the constitutional challenge. It is our opinion that neither of the three above-mentioned acts is an apposite analogy and that the cases arising thereunder afford scant persuasive authority beyond the broad principles enunciated therein.[22]

The duty of this court is classically defined in *United States* v. *Butler*, 297 U.S. at pages 62 and 63:

> "There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land

[22] That the National Labor Relations Act may not be analogized to the Civil Rights Act of 1964 and that the power of Congress is not plenary with respect to the regulation of activities not themselves interstate commerce is made crystal clear by Mr. Justice Black's concurring opinion in *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 652:

"The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce * * *. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation * * *. It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' * * *."

ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves no[r] condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.

"The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members."

Paraphrased, for clarity of discussion, title II of the act declares that no restaurant may refuse service to any person because of his race, color, religion, or

national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce.

No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir. 1959); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

On the authority of the cases collected in footnote 14, *infra*, we believe it to be a settled rule of constitutional law that goods cease to constitute a part of interstate commerce, and become a part of the general property in a state, and amenable to its laws, when they are sent into a state, either for the purpose of sale or in consequence of a sale. The simple truth of the matter is that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce.

If our premise is correct, Congress sought to achieve its end by the sophisticated means of first declaring a restaurant is a place of public accommodation if its operations affect commerce and by thereafter abandoning the "affect commerce" requirement by legislating what is tantamount to a conclusive presumption that its operations do affect commerce if it is proved either that it serves or offers to serve interstate travelers or that a substantial portion of the food which it serves has at some time, however re-

mote, moved in commerce. The courts will not sustain a presumption when there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States*, 319 U.S. 463, at 647–648. The issues presented in the instant case require our consideration of only that portion of the statute relating to restaurants which serve food "a substantial portion" of which "has moved in commerce."

If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct "affect[s] commerce" when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.

We conclude that title II of the Civil Rights Act of 1964, as applied to the business operated by these plaintiffs, was beyond the competence of Congress to enact and that its enforcement against plaintiffs under the circumstances of this case would be violative of the fifth amendment of the Constitution of the United States, in pertinent part reading: "No person shall be * * * deprived of * * *, liberty, or property, without due process of law; * * *" Accordingly, they are entitled to the relief for which they pray.

This 17th day of September, 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

APPENDIX B

Article I, Sec. 8, cl. 3 of the Constitution provides:

> The Congress shall have power * * * To regulate commerce * * * among the several states.

Section 201 of Title II of the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241, 243, provides:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

U.S. GOVERNMENT PRINTING OFFICE:1964

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	7
Argument	11
I. The complaint should be dismissed for want of equity jurisdiction	12
II. Section 201 of the Civil Rights Act of 1964, as applied to appellee's restaurant, is a valid exercise of the commerce clause	24
A. The power to regulate interstate commerce extends to local activities whose regulation is appropriate to protect interstate commerce from burdens or obstructions	27
1. The power of Congress is not confined to the regulation of the course of interstate commerce but extends to matters substantially affecting it	27
2. The power to regulate local matters substantially affecting interstate commerce extends to retail establishments including restaurants	30
3. Cases holding that interstate commerce ends when goods "come to rest" in a State are irrelevant to the power of Congress to regulate local activities which substantially burden interstate commerce	32

746-011—64——1

Argument—Continued
II. Section 201 of the Civil Rights Act, etc.—Con.
B. Racial discrimination in restaurants selling food from out-of-state sources burdens and obstructs interstate commerce— Page 35
1. Racial discrimination in restaurants serving food from out-of-state is a prolific source of disputes burdening and obstructing interstate commerce— 38
2. Racial discrimination in restaurants serving food from out-of-state artificially restricts the market for goods moving in interstate commerce— 44
3. The absence of an explicit recital that racial discrimination in restaurants serving food from out-of-state sources burdens interstate commerce does not invalidate Title II— 48
4. Title II is not invalidated by the absence of provision for an administrative or judicial finding whether discrimination in an individual restaurant affects interstate commerce, before bringing it within the coverage of the Act— 53
Conclusion— 58

CITATIONS

Cases:

Adair v. *United States*, 208 U.S. 161— 29
Adler v. *Board of Education*, 342 U.S. 485— 23
Arizona v. *California*, 283 U.S. 423— 53
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288— 18
Baltimore & Ohio R. Co. v. *Interstate Commerce Comm.*, 221 U.S. 612— 29, 49, 55
Berea College v. *Kentucky*, 211 U.S. 45— 18

Cases—Continued

	Page
Board of Trade of Kansas City v. *Milligan*, 90 F. 2d 855	17
Bolton & Hay, 100 N.L.R.B. 361	32
Boynton v. *Virginia*, 364 U.S. 454	58
Brandeis & Sons, J. L. v. *Labor Board*, 142 F. 2d 977, certiorari denied, 323 U.S. 751	31
Brennan's French Restaurant, 129 N.L.R.B. 52	32
Brooks v. *United States*, 267 U.S. 432	37
Browder v. *Gayle*, 142 F. Supp. 707 affirmed 352 U.S. 902	17
Brown v. *Maryland*, 12 Wheat. 419	33
Caminetti v. *United States*, 242 U.S. 470	37
Carter v. *Carter Coal Co.*, 298 U.S. 238	23, 29
Chicago Board of Trade v. *Olsen*, 262 U.S. 1	29, 36
Chicago & Grand Trunk Ry. v. *Wellman*, 143 U.S. 339	18
Childs Co., 88 NLRB 720	32
Childs Co., 93 N.L.R.B. 281	32
City of Yonkers v. *U.S.*, 320 U.S. 685	50
Civil Rights Cases, The, 109 U.S. 3	25
Clark v. *Paul Gray, Inc.*, 306 U.S. 583	51
Consolidated Edison Co. v. *Labor Board*, 305 U.S. 197	47
Coronado Coal Co. v. *United Mine Workers*, 268 U.S. 295	29
Crown Kosher Supermarket v. *Gallagher*, 176 F. Supp. 466, reversed on other grounds, 366 U.S. 617	17
Culinary Workers & Bartenders Union v. *Labor Board*, 310 F. 2d 853	32
Currin v. *Wallace*, 306 U.S. 1	23, 24
In re Debs, 158 U.S. 465	30
Douglas v. *City of Jeannette*, 319 U.S. 157	8, 16
Euclid v. *Ambler Realty Co.*, 272 U.S. 365	23
Everard's Breweries v. *Day*, 265 U.S. 545	36
Federal Trade Commission v. *Mandel Bros.*, 359 U.S. 385	37, 38, 49
First Employers' Liability Cases, 207 U.S. 463	29
[illegible]ida v. *United States*, 282 U.S. 194	50
Gibbons v. *Ogden*, 9 Wheat. 1	9, 28, 30, 59

Cases—Continued

	Page
Gober v. City of Birmingham, 373 U.S. 374	7
Hamilton v. Kentucky Distilleries Co., 251 U.S. 146	53
Hammer v. Dagenhart, 247 U.S. 251	29
Henderson v. United States, 339 U.S. 816	37, 58
Hendrick v. Maryland, 235 U.S. 610	18
Hooven & Allison Co. v. Evatt, 324 U.S. 652	33
Houston & Texas Ry. v. United States, 234 U.S. 342	29
Int'l Brotherhood v. Labor Board, 341 U.S. 694	31
Joe Hunt's Restaurant, 138 N.L.R.B. 470	32
Kennedy v. Los Angeles Joint Exec. Board, 192 F. Supp. 339	32
Labor Board v. Bradford Dyeing Assn., 310 U.S. 318	57
Labor Board v. Childs Co., 195 F. 2d 617	31
Labor Board v. Denver Bldg. & Const. Trades Council, 341 U.S. 675	31, 47
Labor Board v. Fainblatt, 306 U.S. 601	47
Labor Board v. Gene Compton's Corp., 262 F. 2d 653	32
Labor Board v. Howard Johnson Co., 317 F. 2d 1, certiorari denied, 375 U.S. 920	32
Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1	28, 29, 36
Labor Board v. Laundry Drivers Local, 262 F. 2d 617	31-32
Labor Board v. Local Joint Board, 301 F. 2d 149	31
Labor Board v. Morrison Cafeteria Co. of Little Rock, 311 F. 2d 534	31
Labor Board v. Phoenix Mutual Life Insurance Co., 167 F. 2d 983, certiorari denied, 335 U.S. 845	57
Labor Board v. Reliance Fuel Corp., 371 U.S. 224	11, 28, 30, 46, 57
Legal Tender Cases, 12 Wall 457	50
Lion Manufacturing Corp. v. Kennedy, 330 F. 2d 833	17
Local 74 v. Labor Board, 341 U.S. 707	31
Lottery Case, The, 188 U.S. 321	37
May Department Stores Co. v. Labor Board, 326 U.S. 376	31
McCray v. United States, 195 U.S. 27	53

Cases—Continued

	Page
McCulloch v. *Maryland*, 4 Wheat. 316	53
McDermott v. *Wisconsin*, 228 U.S. 115	38
McGowan v. *Maryland*, 366 U.S. 420	51
McLeod v. *Chefs, Cooks, Pastry Cooks & Assistants Local 89*, 280 F. 2d 760	32
McLeod v. *Chefs, Cooks, Pastry Cooks & Assistants Union*, 286 F. 2d 727	32
Meat Cutters v. *Fairlawn Meats*, 353 U.S. 20	31
Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U.S. 580	51
Mil-Bur, Inc., 94 N.L.R.B. 1161	32
Mintz v. *Baldwin*, 289 U.S. 346	33
Mitchell v. *United States*, 313 U.S. 80	37, 58
Norman v. *Baltimore & Ohio R. Co.*, 294 U.S. 240	35
Pacific States Box and Basket Co. v. *White*, 296 U.S. 176	34
Packer Corp. v. *Utah*, 285 U.S. 105	34
Pennsylvania v. *West Virginia*, 262 U.S. 553	23
Pierce v. *Society of Sisters*, 268 U.S. 510	23
Polish National Alliance v. *Labor Board*, 322 U.S. 643	47, 49
Public Utilities Commission of California v. *United States*, 355 U.S. 534	33
Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U.S. 563	29
Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330	29
Retail Fruits & Vegetable Union v. *Labor Board*, 249 F. 2d 591	31
Richmond Hosiery Mills v. *Camp*, 74 F. 2d 209	16
Ryan v. *Amazon Petroleum Corp.*, 71 F. 2d 1	16
Siemons Mailing Service, 122 N.L.R.B. 81	57
Siler v. *Louisville and Nashville R. Co.*, 213 U.S. 175	18
Sinking Fund Cases, 99 U.S. 700	51
Sioux Valley Empire Electric Assn., 122 N.L.R.B. 92	57
Smitley v. *Labor Board*, 327 F. 2d 351	32
Southern Railway Co. v. *United States*, 222 U.S. 20	29, 49, 55

Cases—Continued

	Page
South Carolina State Highway Dept. v. *Barnwell Bros.*, 303 U.S. 177	33, 51
Sparks v. *Millwood Dairy*, 74 F. 2d 695	17
Spielman Motor Co. v. *Dodge*, 295 U.S. 89	15
Stafford v. *Wallace*, 258 U.S. 495	36
Standard Oil Co. v. *United States*, 221 U.S. 1	29
Stanton Enterprises, Inc., 147 N.L.R.B. No. 81, 4 CCH Lab. L. Rep. 21,075, para. 13,211	32
Stork Restaurant, Inc. v. *McLeod*, 312 F. 2d 105	32
Stouffer Corp., The, 101 N.L.R.B. 1331	32
Superior Court of Washington v. *Yellow Cab Co.*, 361 U.S. 373	34
Swift & Co. v. *United States*, 196 U.S. 375	35
Terrace v. *Thompson*, 263 U.S. 197	22
Texas and New Orleans Railroad v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548	29
Townsend v. *Yeomans*, 301 U.S. 441	52
Tyler v. *Judges of the Court of Registration*, 179 U.S. 45	13
United Public Workers v. *Mitchell*, 330 U.S. 75	17
United States v. *Butler*, 297 U.S. 1	51
United States v. *Carolene Products Co.*, 304 U.S. 144	51
United States v. *Darby*, 312 U.S. 100	11, 28, 29, 38, 54, 56
United States v. *Ferger*, 250 U.S. 199	29, 49, 55
United States v. *Harris*, 106 U.S. 629	51
United States v. *E. C. Knight*, 156 U.S. 1	29
United States v. *Lowden*, 308 U.S. 225	29
United States v. *Sullivan*, 332 U.S. 689	37, 49
United States v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86	33
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110	27
Veazie Bank v. *Fenno*, 8 Wall. 533	53
Virginian Ry. v. *System Federation No. 40*, 300 U.S. 515	29, 49
United States v. *Yellow Cab Co.*, 332 U.S. 218	34
Watson v. *Buck*, 313 U.S. 387	17
Weigle v. *Curtice Bros. Co.*, 248 U.S. 285	34
Wickard v. *Filburn*, 317 U.S. 111	17, 27, 29, 46, 47, 55
Woodruff v. *Parham*, 8 Wall. 123	33

Cases—Continued Page
Yarnell v. Hillsborough Packing Co., 70 F. 2d 435 16
Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 33
U.S. Constitution and Statutes:
Art. I, Sec. 8, Cl. 3 25, 27
Art. I, Sec. 8, Cl. 18 25
First Amendment 11, 24, 59
Fifth Amendment 7, 11, 24, 59
Ninth Amendment 11, 24
Tenth Amendment 4, 11, 24
Thirteenth Amendment 11, 24, 59
Fourteenth Amendment 6, 10
Fourteenth Amendment, Section 5 26
Civil Rights Act of 1875, 18 Stat. 335 26
Civil Rights Act of 1957, 71 Stat. 637 20
Civil Rights Act of 1960, 74 Stat. 86 20
Civil Rights Act of 1964 2, 4, 5, 8, 12, 13, 19, 20, 21, 25, 59
Title II 2, 4, 5, 6, 7, 12, 13, 15, 20, 53, 58, 59
Sec. 201 8, 13, 24, 54, 55
Sec. 201(a) 12, 52
Sec. 201(b)(1) 19
Sec. 201(b)(2) 19
Sec. 201(b)(3) 19
Sec. 201(c)(2) 4, 12
Sec. 201(d) 10, 25
Sec. 207(b) 13
Title X 20
Automobile Information Disclosure Act, 15 U.S.C. 1231 49
Bill of Lading Act, 49 U.S.C. 121 49
Fair Labor Standards Act, 29 U.S.C. 201 48, 49
Fair Labor Standards Act, 29 U.S.C. 201, Sec. 6 55
Fair Labor Standards Act, 29 U.S.C. 201, Sec. 7 55
Fair Labor Standards Act, 29 U.S.C. 201, Sec. 15 (a)(2) 55
Federal Food, Drug & Cosmetic Act, 21 U.S.C. 201 37
Fur Products Labelling Act, 15 U.S.C. 69 49
National Labor Relations Act, 29 U.S.C. 141 48, 49
Railway Labor Act, 45 U.S.C. 151 49
Safety Appliance Acts, 45 U.S.C. 8 49
Safety Appliance Acts, 49 U.S.C. 26 49

U.S. Constitution and Statutes—Continued Page
Securities Exchange Act of 1934, 15 U.S.C. 78b 49
Textile Fiber Products Identification Act, 15 U.S.C. 70 49
Trust Indenture Act of 1939, 15 U.S.C. 77bbb 49
18 U.S.C. 241, 242 13, 20
28 U.S.C. 1252 2
28 U.S.C. 1253 2
Miscellaneous:
Analysis of Prof. Paul A. Freund, S. Rep. 872, 88th Cong., 2d Sess., pp. 82–83 38
Census of Business, U.S. Bureau of the Census, 1958 19
110 Cong. Rec. (daily ed.):
P. 7174 44
P. 7980 39
1 Cooley *Constitutional Limitations* (8th ed.), p. 332 18
Hearings before the Committee on Commerce, United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. 27 40, 41, 42, 43, 44, 45, 46
Report of the House Judiciary Committee, 88th Cong., 1st Sess., No. 914, Part 2, on H.R. 7152 (December 2, 1963 42

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS DEB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA, APPELLANTS

v.

OLLIE MCCLUNG, SR., AND OLLIE MCCLUNG, JR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (R. 34) is not yet reported.

JURISDICTION

The order of the district court was entered on September 17, 1964 and a notice of appeal filed on the same date.[1] The jurisdictional statement was filed on

[1] A stay of the order was denied by the district court on September 18, 1964, but granted by order of Mr. Justice Black, dated September 23, 1964.

September 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the complaint should be dismissed for want of equity jurisdiction.

2. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it prohibits racial discrimination by a restaurant "if * * * a substantial portion of the food which it serves * * * has moved in commerce."

STATUTES INVOLVED

The relevant statutory provisions are printed in Appendix A to the government's brief in the companion *Heart of Atlanta* case, No. 515.

STATEMENT

On July 2, 1964, the President of the United States signed into law the Civil Rights Act of 1964. On July 3, 1964, certain unnamed and otherwise unidentified Negroes allegedly entered "Ollie's Barbecue", operated by appellees in Birmingham, Alabama. They requested, but were refused, service at the meal counter; instead, they were offered "take-out" service at the "colored take-out" end of the counter (R. 87–88). Although the federal government had had no communication with appellees concerning compliance with the Civil Rights Act of 1964, appellees, on July 31, 1964, filed a complaint in the United States District Court for the Northern District of Alabama to prohibit appellants from enforcing or attempting to enforce the Act against them.

The complaint contains the following allegations: Appellees' restaurant serves approximately 500,000 meals annually and has gross sales of $350,000 (R. 2). The establishment serves food and non-alcoholic beverages, but specializes in barbecued meats and pies which account for 90% of the business (R. 2). There is parking space on the premises for about 90 automobiles and the seating capacity of the restaurant is about 200 persons. Appellees have 36 employees, 26 Negro and 10 white (R. 2).

"Ollie's Barbecue" is located in a part of Birmingham "largely occupied by Negro residences, and by industrial concerns employing a large number of Negro employees" (R. 4). There is a truck route one block away; the nearest "Federal or Interstate" highway is 11 blocks away; the railroad station 17 blocks; the bus station 20 blocks; and the airport more than five miles (R. 2).

Appellees "do no advertising and make no effort to attract transient customers" (R. 2). The restaurant "derives no trade" from the truck route and, to their knowledge, appellees serve no interstate travelers (R. 2). Negroes have never been served food or beverages for consumption on the premises but have been served for many years on a "take-out" basis (R. 3, 4). If Negroes were allowed service for consumption on the premises, they would occupy appellees' restaurant in large numbers, to the exclusion of appellees' regular customers (R. 5). Appellees' business and property would thereby suffer great injury (R. 5).

The restaurant is described by appellees as "essentially local in character," purchasing all of its food "within the State of Alabama" (R. 2, 5). Although "some of the food served" by appellees "probably originates in some form outside the State of Alabama", the operation of the restaurant, it was averred, "in no way affects interstate commerce" (R. 6).[2]

The complaint further averred that the Civil Rights Act of 1964 exceeds the power granted to Congress under the commerce clause; that enforcement of the Act would deprive them of property without due process of law; that to require appellees to serve persons they had not chosen to serve would constitute "involuntary servitude;" and that "any effort to enforce said Act against these [appellees] would be invalid, in contravention of natural law and in violation of the Tenth Amendment of said Constitution" (R. 6–7).

Appellees state additionally that the Attorney General and his subordinates are enforcing the Act against others in reliance upon the provision "that a restaurant's operations 'affect commerce' if a substantial portion of the food which it serves has merely moved in commerce" (R. 5). They assert that "[t]here is a real and genuine threat" that appellants will seek to apply it to them and that they have "no adequate remedy in law" (R. 7).

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[2] After appellants had moved to dismiss on the ground, *inter alia*, that there was no case or controversy, appellees produced testimony and affidavits indicating that the meat products which they purchased for use originate outside the State of Alabama, thus bringing themselves within the language of section 201(c)(2) of the Act.

On August 4, 1964, a three-judge court was designated. On the following day, a hearing was scheduled for September 1, 1964 on appellees' prayer for a temporary injunction (R. 11, 12). On August 19, 1964, appellants filed a motion to dismiss, asserting that the court lacked equitable jurisdiction because appellees had an adequate remedy of law by way of a defense to a proceeding under Title II of the Civil Rights Act of 1964 (R. 16–17).

On August 21, 1964, appellees filed an amendment to their complaint, striking references to JOHN DOE AND RUTH ROE, unidentified private defendants. The amendment added the claim that the Civil Rights Act of 1964 violated appellees' rights under the First Amendment (R. 18–19).

On September 1, 1964, a hearing was held on the appellants' motion to dismiss and on appellees' prayer for a preliminary injunction. The only witnesses were the appellees. Their testimony largely repeats the allegations of their complaint. However, in testifying that the nearest interstate highway was 11 blocks from his restaurant, Ollie McClung, Sr., acknowledged that there was a State highway which passed directly by his restaurant and intersected the interstate highway (R. 71). He also stated that he had declined service to Negroes because of their race (R. 77); that most of the restaurants in Birmingham had served Negroes since the Civil Rights Bill was signed on July 2, 1964; that one of them had lost 25 percent of its business; and that he had not heard from any representative of the federal government concerning compliance with the Civil Rights Act

(R. 78, 86). Ollie McClung, Jr., testified that on July 3, 1964, a group of Negroes requested counter service at the restaurant and were refused because "it wasn't our policy to serve them there and they got up and left" (R. 88). An affidavit was introduced to the effect that all of the meat sold to appellees by their principal supplier, valued at $69,683 for the past twelve months and constituting 46 percent of all its purchases, was procured from facilities located outside the State of Alabama (R. 31–32).

On September 17, 1964, the three-judge court ruled that Title II of the Act is unconstitutional as applied to appellees and enjoined appellants from enforcing it against them pending further order of the court. The court found that a substantial portion of the food served by appellees had moved in commerce and that they were therefore within the terms of the statute. It stated that since Title II imposed a mandatory duty of service upon appellees and since the Attorney General was engaged in enforcing it according to its terms, the prospect of its application to appellees was "reasonably imminent." Turning to the question whether the Act was a proper exercise of the commerce power, the court reasoned that the out-of-State supplies handled by appellees had come to rest before they were sold by the restaurant and that there was no basis for concluding that there was any "demonstrable causal connection" between the activities of the restaurant and interstate commerce.[3] In

[3] The court had previously ruled that the legislative powers conferred by the Fourteenth Amendment was not in point since there was no showing that the State of Alabama was in-

these circumstances, the court stated, application of the Act to appellees would violate the Fifth Amendment.

SUMMARY OF ARGUMENT

I

The complaint should be dismissed for want of equity jurisdiction. Title II of the Civil Rights Act of 1964 provides for enforcement only by a civil action for an injunction, at which point all factual and legal defenses can be raised. The Act authorizes no criminal prosecution and provides for no civil penalties. There is no provision for the award of damages to any person. In this case there has been no threat to seek an injunction against appellees; before they filed suit the Department of Justice did not even know of their existence. Appellees claim that they would be injured by compliance but they deny any intent to comply and they neither alleged nor proved that the Act operated *ex proprio vigore* to discourage patronage and thus injure their business. In short, this is a suit seeking to enjoin a possible suit for an injunction not even threatened.

There is no precedent for adjudicating constitutional issues in such an action. Even where the statute provides criminal penalties, the imminence of prosecution "is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordi-

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volved in appellees' decision not to serve Negroes. The Birmingham restaurant segregation ordinance involved in *Gober* v. *City of Birmingham*, 373 U.S. 374, was repealed on July 26, 1963 (Ordinance No. 63–15).

hance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163.

There are three reasons for that rule, which apply with still greater force where there is no shadow of present injury and the statute provides no penalties. *First*, the judicial branch will not adjudicate questions of constitutionality in the absence of a clear need. *Second*, permitting such suits would interfere with the normal processes of law enforcement by compelling the Department of Justice to expend its substance in defending unnecessary cases instead of applying its resources in the manner best calculated to promote the public interest. *Third*, a rule allowing suits to enjoin enforcement of the Civil Rights Act could not be confined to that statute alone but would extend at least to all other regulatory laws, State and federal, when challenged on constitutional grounds. The potentiality for damaging interference with the normal administration of government is obvious.

II

Section 201 of the Civil Rights Act of 1964, both in general and as applied to appellees' restaurant, is a valid exercise of the constitutional power to regulate interstate commerce.

The power to regulate interstate commerce extends to local activities which are not part of the stream of commerce but whose regulation is appropriate to foster and promote commerce, or to protect it from

burdens or obstructions. This principle is established by a wealth of decisions in this Court extending back to *Gibbons* v. *Ogden*, 9 Wheat. 1. Both this Court and inferior courts have repeatedly applied the principle to federal regulation of the activities of retail establishments, including restaurants, where those activities would burden or obstruct interstate commerce. The critical inquiry in the present case, therefore, is whether racial discrimination in a local restaurant, as a matter of fact, burdens or obstructs the movement of goods in interstate commerce.

That practical inquiry is primarily for Congress, and its action is binding unless it appears to have no reasonable relation to the authorized end. Here, the evidence before Congress gave it ample ground for concluding that racial discrimination in places of public accommodation that receive goods from out-of-State sources, including restaurants, is a prolific source of disputes and demonstrations sharply curtailing their business activities and reducing their purchases of out-of-State goods. In addition, the practice of racial discrimination in places of public accommodation was shown drastically to curtail the retail market and thus to restrict the demand for out-of-State goods.

It is irrelevant that the volume of goods purchased by appellees' restaurant, viewed in isolation, has scant effect upon the total volume of goods moving in interstate commerce. Congress was entitled to take into account the fact that each individual situation was representative of many others throughout the

country, the total incidence of which would be far-reaching in its impact upon commerce. It was also entitled to judge the importance of the commercial relationship between racial discrimination in restaurants and the interstate flow of goods in the light of the evidence that the discrimination and resulting threat of disturbances at any one establishment are part of a complex and interrelated national problem.

The absence of an explicit recital that Congress found that racial discrimination in places of public accommodation burdens interstate commerce does not warrant the conclusion, drawn in the opinion below, "that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant * * * and interstate commerce" (R. 48). Except where it was dealing with discrimination supported by State action in violation of the Fourteenth Amendment, Congress prohibited discrimination only in those establishments which have a close and intimate tie to interstate commerce—in the case of restaurants, through serving food which comes from out of State (Section 201(d)). We think this amounts to a declared finding that in such establishments racial discrimination burdens and obstructs interstate commerce. But even if that affirmative inference is unwarranted, the reasoning below has a fatal gap. Those challenging the constitutionality of an Act of Congress must show "that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" (*United States* v.

Butler, 297 U.S. 1, 67). Formal findings may aid the Court to understand the predicate of particular legislation but "[e]ven in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators" (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 152). Appellees have not only failed to make such a showing but the factual support for the legislation affirmatively appears.

Nor is Title II invalidated by the absence of provision for an administrative or judicial finding whether discrimination in an individual restaurant affects interstate commerce. *United States* v. *Darby*, 312 U.S. 100, 120–121; *Labor Board* v. *Reliance Fuel Co.*, 371 U.S. 224.[1]

ARGUMENT

In the court below the government urged (1) that the bill should be dismissed for want of jurisdiction upon several grounds, among others because equity would not enjoin the enforcement of a statute where there was no threat to apply it to the plaintiff and no danger of injury; and (2) that if the district court

[1] The arguments presented by appellees under the First, Fifth, Ninth, Tenth and Thirteenth Amendments are answered, so far as appears necessary, in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term.

reached the merits, Title II of the Civil Rights Act of 1964 should be held constitutional.

From the standpoint of the immediate administration of the Civil Rights Act we would welcome a decision upon the constitutionality of Title II as applied to establishments like appellees' restaurant. The decision below, however, sustaining the power of a district court to render an opinion upon the constitutionality of a federal statute upon the bare request of any person who alleges that he is subject to the Act, without any showing of irreparable injury, threatens such serious interference with the normal operations of the government as to require us to insist upon the jurisdictional objection in addition to arguing the merits.

I

THE COMPLAINT SHOULD BE DISMISSED FOR WANT OF EQUITY JURISDICTION

In the present case plaintiffs sued only to enjoin a possible future suit for an injunction. Prior to the filing of suit neither the Attorney General nor the Department of Justice even knew of the plaintiffs' existence, much less any of the facts bearing upon the coverage of their restaurant under Section 201(c)(2) and their compliance with Section 201 (a). The only possible sanction that anyone can invoke against them is a civil action to compel future compliance.

We know of no precedent for such a superfluous action. Plaintiffs cannot be harmed by waiting to assert their contentions as defenses if and when the Attorney General (or a private party) seeks to enforce

the statute. Present relief is not only quite unnecessary, therefore, to protect their interests; it is also affirmatively harmful to the recognized and significant public interest in avoiding premature decision of constitutional questions and in allowing authorized officials to exercise an informed discretion in administering regulatory legislation.

A. The Civil Rights Act of 1964 was carefully drawn so as to ensure that no proprietor of a "place of public accommodation" would be subjected to any sanction or liability until after the applicability of Title II to his business had been determined in a district court proceeding for an injunction with full opportunity for appellate review. Title II provides only for enforcement by a civil action for an injunction. There are no criminal or civil penalties. There is no provision for the award of damages. Section 207(b) provides explicitly that "[t]he remedies provided in the title shall be the exclusive means of enforcing the rights based on this title * * *." Appellees can incur no legal sanctions until (1) their rights and duties under the Constitution and statute have been determined in the federal courts and (2) they have been ordered to comply with the statute. They are not even subjected to the familiar choice of obeying the statute or incurring the risk of prosecution.

There neither is nor could be a showing that the mere existence of the statute and the general intention of the Attorney General to enforce it subjects ap-

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It is possible that if outsiders conspire to prevent a restaurant from complying with Section 201, they can be prosecuted under 18 U.S.C. 241.

pellees to a threat of irreparable injury. Appellees contend that the statute is void because it is unconstitutional and allege that their business and property would suffer *if* they complied with the statute (Complaint, par. 7); but they are not currently complying, do not intend to comply, and incur no risk of any sanctions for failure to comply until after their rights and duties have been determined in judicial proceedings. There is also an allegation that "[e]nforcement or attempts to enforce said Act against plaintiffs by either defendants or by other so-called 'aggrieved' persons would subject plaintiffs to the burdens, inconvenience and expense of litigation and the aggravation of such burdens and expenses occasioned by a potential multiplicity of suits" (Complaint, par. 8). This allegation will not survive analysis. An enforcement suit by the Attorney General, if one were brought, could subject appellees to no greater trouble or expense than their own suit against the Attorney General; indeed, from appellees' standpoint, the former expense was contingent at worst whereas by prosecution of this action they insisted upon incurring those costs. And an injunction issued against the Attorney General would not bar suits by aggrieved persons. The grounds of the decision might discourage future litigation, but no more so than would the grounds of decision in the first suit for an injunction brought against appellees under the statute. The likelihood or unlikelihood of a multiplicity of suits is identical in both circumstances. Nor is the possibility that an unknown person, at some unknown future time, may file some

unidentified suit, based perhaps upon new conditions, a sufficient ground for equitable relief.

In sum, appellees have failed to show irreparable injury or other grounds for an injunction, because they have an entirely adequate remedy in the defense of any action for an injunction that the Attorney General may bring against them. The complaint is no more than a request for an immediate advisory opinion upon the constitutionality of Title II of the Civil Rights Act, having no foundation other than the possibility that the Attorney General may, at some future date, seek an injunction requiring appellees prospectively to comply with the Act. Whether that be enough for a "case or controversy" may be open to argument, but it is plainly insufficient to support equity jurisdiction in a suit intended to determine the constitutionality of a federal statute.

B. In a case where a party seeks to enjoin enforcement of a law on constitutional grounds, the courts are insistent not only that his claim be concrete and ripe, but that he be able to show the threat of immediate, irreparable injury which makes it necessary for equity to intervene without delay. Speaking of a suit to enjoin a State regulatory law imposing criminal sanctions, Chief Justice Hughes stated in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95:

> The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500. See, also, *In re Sawyer*, 124 U.S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los*

> *Angeles*, 189 U.S. 207, 217. To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See *Terrace* v. *Thompson*, 263 U.S. 197, 214; *Packard* v. *Banton*, 264 U.S. 140, 143; *Tyson* v. *Banton*, 273 U.S. 418, 428; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452; *Ex parte Young*, 209 U.S. 123, 161–162. We have said that it must appear that "the danger of irreparable loss is both great and immediate"; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. * * *

The point was restated by Chief Justice Stone in *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

Similarly, the courts have repeatedly refused to enjoin federal officials from proceeding against violations of federal statutes. *E.g.*, *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, 6 (C.A. 5); *Richmond Hosiery Mills* v. *Camp*, 74 F. 2d 200 (C.A.

5); *Sparks* v. *Mellwood Dairy*, 74 F. 2d 695 (C.A. 6); *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (C.A. 8). The mere fact that the government's law enforcement officers stand ready to perform their enforcement duties under the Act "falls far short of such a threat as would warrant the intervention of equity." *Watson* v. *Buck*, 313 U.S. 387, 400; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 88. See, also, *Lion Manufacturing Corporation* v. *Kennedy*, 330 F. 2d 833 (C.A. D.C.).

These are some cases which indicate a softening of the requirement that the danger of irreparable loss be both "great and immediate." *E.g.*, *Browder* v. *Gayle*, 142 F. Supp. 707, affirmed, 352 U.S. 902, and *Crown Kosher Supermarket* v. *Gallagher*, 176 F. Supp. 466, reversed on other grounds, 366 U.S. 617. Possibly *Wickard* v. *Filburn*, 317 U.S. 111, was such a case, although the point is not discussed in the opinion. We know of no decision, however, remotely suggesting that the bare allegation that one is covered by an allegedly unconstitutional statute providing no penalties and creating no sanctions save a possible action for prospective relief is sufficient to obtain an injunction against the normal processes of law enforcement. To such a case as this, therefore, the three considerations opposed to anticipatory intervention by equity with the processes of law enforcement through criminal prosecution apply with still greater force.

First, the judicial branch will not adjudicate questions of constitutionality in the absence of necessity.

"It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, *Constitutional Limitations* (8th ed.), p. 332, quoted by Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341, 345. The principle is exemplified by familiar precepts: the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding;[6] or when the case may be decided upon another ground;[7] or when the action is brought by one who fails to show that he has been injured by the operation of the statute.[8] The basic policy is also implemented by the rule barring injunction against the enforcement of a statute by public officials where the complainant, without risk of irreparable injury, could wait and raise his constitutional defense in any action brought against him.

Second, the rule is necessary to prevent interference with the normal processes of law enforcement. If the possibility that appellees might be sued by the Attorney General to compel them to comply with the statute at some indeterminate future date were

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[6] *E.g.*, *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345.

[7] *E.g.*, *Siler* v. *Louisville and Nashville R. Co.*, 213 U.S. 175, 191; *Berea College* v. *Kentucky*, 211 U.S. 45, 53.

[8] *E.g.*, *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405; *Hendrick* v. *Maryland*, 235 U.S. 610, 621.

sufficient predicate for them to bring action against the Attorney General, any proprietor of any place of public accommodation in the United States, who is potentially subject to the Civil Rights Act of 1964, could seek an advisory determination as to whether the statute could be constitutionally applied to him. The resources of the government are not unlimited. It is essential that the time and funds available for enforcement be allocated in a manner that will best promote the public interest. The necessity of defending every case in which one potentially subject to the statute desires an advisory opinion upon its constitutionality would interfere significantly with the normal processes of law enforcement.

The facts in the present case are particularly striking. There were, in 1958 (the last year for which published Census figures are available),[9] over 115,000 restaurants, lunch counters, and gasoline stations in 16 Southern or border States[10] which, if they meet the statutory test of "affecting commerce," as most will, are places of public accommodation under Section 201(b)(2) of the 1964 Act. There are, in addition, about 20,000 hotels and motels in these States which fall under Section 201(b)(1), and another 6,000 motion picture theaters which fall under Section 201(b)(3). The Civil Rights Division of the

[9] The 1958 Census of Business, compiled by the U.S. Bureau of the Census. A similar study was made during 1963, but it has not yet been published.

[10] Texas, Louisiana, Oklahoma, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, Florida, Georgia, South Carolina, North Carolina, Virginia, West Virginia, Maryland, Delaware.

Department of Justice has 55 lawyers to handle litigation under Title II, as well as all the other titles of the 1964 Act, the 1960 Act,[11] the 1957 Act,[12] and the early federal civil rights statutes.[13] It is hardly necessary to point out the import of these facts. The Department of Justice can only perform its functions under these statutes if it is free to select carefully the cases it will bring so as to use its limited manpower in the most effective way. The decision as to which cases will be litigated, and where and when, cannot be left to the private parties subject to the public accommodations provision of the 1964 Act.

There are other important administrative considerations. Congress has provided in Title X of the 1964 Act for a Community Relations Service, now headed by Governor Leroy Collins, which is intended "to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race * * *." 78 Stat. 267. It is hoped that this approach—voluntary negotiation and discussion—will avoid the necessity of numerous legal proceedings under Title II. The Department of Justice can coordinate its enforcement activities under Title II with the activities of the Director of the Community Relations Service under Title X, but the efforts of the Community Relations Service could be undermined by untimely suits by those opposed to the

[11] 74 Stat. 86.
[12] 71 Stat. 637.
[13] 18 U.S.C. 241, 242.

provisions of the statute and equally opposed to voluntary compliance with desegregation.

Third, a rule allowing suit to enjoin enforcement of the Civil Rights Act, even though the plaintiff would be in no way harmed by awaiting the outcome of the statutory proceedings, could not be confined to this statute alone. The same principle would be applicable under any other regulatory statute, such as the National Labor Relations Act, the Fair Labor Standards Act, the Securities and Exchange Commission Act, etc. The potentiality for interference with the normal administration of such laws is obvious. Nor do we see how the principle, once established, could be confined to suits raising constitutional issues, unless upon the ground that the action is against the United States where it is not alleged that the Attorney General is acting without constitutional authority.[11] There would seem to be no less ground for asserting equitable jurisdiction in the case of a claim that a regulatory statute did not apply to a complainant against whom it might be enforced, or did not outlaw his conduct, or otherwise bear an interpretation which the government might put upon it.

C. The cases cited by the court below give no support to the assertion of equity jurisdiction to enjoin the enforcement of Title II. Each involved a threat of immediate substantial injury to the plaintiff; none even approached the present case, where the plaintiff cannot be harmed by awaiting any proceedings

[11] See Brief for the Respondent in *Robinowitz* v. *Kennedy, Attorney General*, No. 287, October Term, 1963, pp. 39–40.

against him. Indeed, the cases cited do not even provide authority for the proposition that a person subject to a regulatory statute with immediate penal sanctions can obtain an adjudication as to the constitutionality of the statute without incurring the risk of violation.

The majority of the cases presented situations like that in *Terrace* v. *Thompson*, 263 U.S. 197, where the existence of the statute imposing severe penalties and forfeiture of the land upon one who leased farming land to an alien who had not declared an intention to become a citizen, and also upon the alien who acquired an interest in the land, operated *ex proprio vigore* to interfere with the owner's right to dispose of his property and the alien's right to pursue the occupation of farmer (263 U.S. 215–216):

> The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease.

The same kind of interference with an advantageous relationship for which there was no adequate

remedy at law was proved in *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365; and *Public Utilities Commission of California* v. *United States*, 355 U.S. 534.[15] The plaintiff's interest in, and need for, an equitable remedy is obvious where the statute imposes criminal penalties on those engaged in business dealings with the plaintiff unless they discontinue their dealings. Then there is no adequate remedy at law, for the plaintiff cannot require those dealing with him to risk criminal penalties to test the validity of the statute.

In *Pennsylvania* v. *West Virginia*, 262 U.S. 553, both States were seeking to withdraw natural gas from the same pool under circumstances in which the withdrawal by one would cause widespread injury in the other. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, was not a suit against the Attorney General to enjoin enforcement but a minority stockholder's bill to enjoin the corporation from complying with the statute; in any event, irreparable harm was threatened. The point was not raised in *Adler* v. *Board of Education*, 342 U.S. 485; undoubtedly because the action had been brought in a State court and presented no question of federal equity jurisdiction. In *Currin* v. *Wallace*,

[15] In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, the Court did not discuss the irreparable injury, but the theory of equity jurisdiction clearly appears from the Brief for the United States, No. 23, October Term 1957, pp. 23, 27.

306 U.S. 1, the opinion of the lower court clearly shows that the plaintiffs would have incurred penalties "which would be ruinous to them" if they violated the statute and its constitutionality were upheld (95 F. 2d 856, 861). In short, none of the cases relied upon by the court below provide support for the present case, where the plaintiffs have not even shown that they have been harmed in any way by the operation of the statute.

II

SECTION 201 OF THE CIVIL RIGHTS ACT OF 1964, AS APPLIED TO APPELLEE'S RESTAURANT, IS A VALID EXERCISE OF THE COMMERCE POWER

In our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term, we outlined the general plan of Title II of the Civil Rights Act of 1964 which grants all persons a right to the full and equal enjoyment of the goods, services or facilities of any "place of public accommodation" as defined therein, and we endeavored to show that, both in general plan and in specific application to hotels and motels, Title II is a valid exercise of the power to regulate interstate commerce. In this case we deal with the application of Title II to a restaurant which serves the general public and receives the products which it sells from other States.[16]

Section 201 (b) and (c) define as a place of public accommodation subject to the duty to make its goods,

[16] The challenges to Title II based upon the Fifth, Ninth, Tenth and Thirteenth Amendments are answered in our *Heart of Atlanta* brief. Appellees' argument based upon the First Amendment requires no response.

services and facilities available without regard to race or color—

> any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility engaged in selling food for consumption on the premises

if—

> a substantial portion of the food which it serves * * * has moved in commerce.

Appellees allege that their restaurant is covered by the foregoing provision and that they are, nevertheless, engaged in racial discrimination. We accept the allegations. The district court found that in the twelve months preceding the passage of the Civil Rights Act of 1964 appellees purchased approximately $150,000 worth of food locally, but that about 46 percent of its purchases were meat which had been shipped in to the local packer and wholesaler from outside the State of Alabama (R. 36). The government on its part agreed in the lower court that the discrimination at appellees' restaurant was not being supported by the State of Alabama within the meaning of Section 201(d). Thus, the question is whether Title II, as applied to a restaurant receiving about $70,000 worth of food indirectly from outside the State, is a valid exercise of the power of Congress to regulate interstate commerce (Art. I, Sec. 8, cl. 3) and to enact all laws necessary and proper for the execution of the commerce power (Art. I, Sec. 8, cl. 18). The *Civil Rights Cases*, 109 U.S. 3, throw no light upon the issue because the Civil Rights Act of

746-011—64——8

1875, 18 Stat. 335, was not conceived or sought to be justified under the commerce power.[17]

The major premise of our argument is the familiar rule that the powers thus delegated to Congress extend to local activities, even though they are not themselves interstate commerce, if they have such a close and substantial relation to interstate commerce that their regulation is appropriate to foster or promote such commerce, or to relieve it from burdens or obstructions. The minor premise of our argument is that Congress, to which the economic question is primarily committed, had ample basis upon which to find that racial discrimination at restaurants which receive from out-of-State a substantial portion of the food served does in fact impose commercial burdens of national magnitude upon interstate commerce.

[17] The opinion below states that the court had been advised that the Solicitor General, in brief, had urged upon the Supreme Court the sufficiency of the grant of power in the commerce clause to sustain the challenged legislation. Evidently the court was partially misinformed. The brief filed by Solicitor General Phillips at the October Term, 1882, makes no such argument, nor is any contained in the summary of his oral argument in the United States Reports, 109 U.S. 3, 5–7. At the October Term, 1879, a brief had been filed in three of the cases by Attorney General Devens. One sentence stated that inns were essential instrumentalities of commerce, which it was the province of the United States to regulate prior to the Civil War amendments. This appears to have been a passing comment for the entire thrust of the brief lies in the proposition that the power to enact the Civil Rights Act of 1875 was granted by Section 5 of the Fourteenth Amendment.

A. THE POWER TO REGULATE INTERSTATE COMMERCE EXTENDS TO LOCAL ACTIVITIES WHOSE REGULATION IS APPROPRIATE TO PROTECT INTERSTATE COMMERCE FROM BURDENS OR OBSTRUCTIONS

1. The power of Congress is not confined to the regulation of the course of interstate commerce but extends to matters substantially affecting it

Article I, Section 8, clause 3 confers upon Congress the power "To regulate Commerce * * * among the several States." Clause 18 of the same Article grants the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *." Under those provisions the Congress has ample power not only to regulate interstate travel, transportation and communication, but also to deal with other matters which substantially affect such commerce even though they might be local when viewed in isolation. "The commerce power," Chief Justice Stone held for a unanimous court in *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, "is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make the regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." Mr. Justice Jackson, also speaking for a unanimous court, restated the principle in *Wickard* v. *Filburn*, 317 U.S. 111, 125, in words precisely applicable to the present case:

> * * * even if appellee's activity be local and though it may not be regarded as commerce, it

> may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

See, also, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37; *United States* v. *Darby*, 312 U.S. 100, 119; *Labor Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226–227.

There is no novelty in this principle, nor was it new in the cases cited above. The principle was established by Chief Justice Marshall, speaking for the Court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, one hundred and forty years ago:

> The genius and character of the whole government seem to be, that its action is to be applied to all those external concerns of the nations and *to those internal concerns which affect the States generally* * * *. [Emphasis added.]

In describing the local activities which Congress could not regulate he was careful to exclude from the definition—and thus mark as within the federal commerce power—those local activities which affect other States and with which it is necessary to deal in order to regulate interstate commerce. Thus, he described the local activities removed from federal action as *ibid.*—

> those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Although the subsequent course of decision included some departures from the original principle,[18] the principle found frequent application even prior to the Labor Board cases and other decisions cited above. It was applied to violence shutting down production at a coal mine whence coal might be shipped in interstate commerce, *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, to the activities of a local grain exchange shown to have an injurious effect upon interstate commerce, *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, to regulation of the intrastate rates of interstate carriers, *Houston & Texas Ry.* v. *United States*, 234 U.S. 342; *Railroad Comm. of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, to the safety devices upon rolling stock moving in local commerce, *Southern Ry. Co.* v. *United States*, 222 U.S. 20, and to the regulation of hours worked by employees engaged in intrastate activity related to the movement of any train, *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612. In *United*

[18] The chief departures are *United States* v. *E. C. Knight*, 156 U.S. 1 (rejected in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 68–69, and *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38–39); *Adair* v. *United States*, 208 U.S. 161 (substantially overruled in *Texas and New Orleans Railroad* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548; *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (disapproved in *United States* v. *Lowden*, 308 U.S. 225, 239); *First Employers' Liability Cases*, 207 U.S. 463 (disapproved in *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 557), *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (disapproved in *United States* v. *Darby*, 312 U.S. 100, and overruled in *Wickard* v. *Filburn*, 317 U.S. 111, 122, n. 21); *Hammer* v. *Dagenhart*, 247 U.S. 251 (overruled in *United States* v. *Darby*, 312 U.S. 100, 117).

States v. *Ferger*, 250 U.S. 199, 203, Mr. Chief Justice White pointed out that the power of Congress "must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U.S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

There was comparatively little federal regulation of interstate commerce in the nineteenth century. The need and therefore the volume of legislation increased greatly in the present century. Furthermore, the increasing interdependence of all parts of the economy and changes in commercial practices have, in fact, linked to interstate commerce through close and substantial connections many activities which, as a matter of fact, had no effect upon such commerce in earlier years. This is the reason the governing principle has found its clearest application in decisions sustaining modern economic legislation. The principle, however, as shown by the Court's opinion in *Gibbons* v. *Ogden*, is as old as the Constitution itself.

2. The power to regulate local matters substantially affecting interstate commerce extends to retail establishments including restaurants

A host of familiar precedents sustains the power of Congress to regulate the activities of retail establishments, including restaurants, which directly or indirectly receive goods from out of State, where those activities burden or obstruct interstate commerce. In *Labor Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, this

Court held that the National Labor Relations Board had jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local, where the retailer obtained the oil from a wholesaler who imported it from another State. That decision accords with a long series of cases basing federal power over the labor relations of a retail business on the threat to the market for interstate goods caused by unfair labor practices that may decrease its purchases of goods originating in other States. See, *e.g.*, *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675, 683–684; *May Department Stores Co.* v. *Labor Board*, 326 U.S. 376 (retail store); *J. L. Brandeis & Sons* v. *Labor Board*, 142 F. 2d 977 (C.A. 8), certiorari denied, 323 U.S. 751 (retail store); *McLeod* v. *Bakery Drivers Local*, 204 F. Supp. 288 (E.D. N.Y.) (bakery); *Retail Fruit & Vegetable Union* v. *Labor Board*, 249 F. 2d 591 (C.A. 9) (retail store); *Int'l. Brotherhood* v. *Labor Board*, 341 U.S. 694 (construction project); *Local 74* v. *Labor Board*, 341 U.S. 707 (store, dwelling renovation); *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (retail grocery).

In particular, the Labor Board has on many occasions regulated labor relations in restaurants, on the theory that disputes in restaurants tend to diminish the quantity of food and other products purchased by the restaurant to serve its customers. See, *e.g.*, *Labor Board* v. *Morrison Cafeteria Co. of Little Rock*, 311 F. 2d 534 (C.A. 8); *Labor Board* v. *Local Joint Exec. Board*, 301 F. 2d 149 (C.A. 9); *Labor Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2); *Labor Board* v. *Laundry*

Drivers Local, 262 F. 2d 617 (C.A. 9); *Labor Board* v. *Gene Compton's Corp.*, 262 F. 2d 653 (C.A. 9); *Labor Board* v. *Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920; *Kennedy* v. *Los Anegeles Joint Exec. Board*, 192 F. Supp. 339 (S.D. Cal.); *Culinary Workers & Bartenders Union* v. *Labor Board*, 310 F. 2d 853 (C.A.D.C.); *Smitley* v. *Labor Board*, 327 F. 2d 351 (C.A. 9); *Stanton Enterprises, Inc.*, 147 NLRB No. 81, 4 CCH Lab. L. Rep. 21,075, para. 13,211; *Stork Restaurant, Inc.* v. *McLeod*, 312 F. 2d 105 (C.A. 2); *McLeod* v. *Chefs, Cooks, Pastry Cooks & Assistants Union*, 280 F. 2d 760 (C.A. 2); *McLeod* v. *Chefs, Cooks, Pastry Cooks & Assistants Local 89*, 286 F. 2d 727 (C.A. 2).[19]

As pointed out in more detail, with appropriate citation of precedents, in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, pp. 33–36, the same principle has been applied under the Sherman and Federal Trade Commission Acts.

3. Cases holding that interstate commerce ends when goods "come to rest" in a State are irrelevant to the power of Congress to regulate local activities which substantially burden interstate commerce

Implicit in what we have already said is the distinction between the present case and cases holding that interstate commerce ends when goods come to rest in the State of destination. When the issue is whether the goods are immune from State taxation,

[19] See also, *Brennan's French Restaurant*, 129 N.L.R.B. 52; *Joe Hunt's Restaurant*, 138 N.L.R.B. 470; *Childs Co.*, 88 N.L.R.B. 720; *Childs Co.*, 93 N.L.R.B. 281; *Bolton & Hay*, 100 N.L.R.B. 361; *The Stouffer Corp.*, 101 N.L.R.B. 1331; *Mil-Bur, Inc.*, 94 N.L.R.B. 1161.

or whether the States may not regulate the conduct because of the need for uniformity, then it may be pertinent to ask whether the goods have ceased to be part of interstate commerce,[20] for the commerce clause does not operate *ex proprio vigore* to exclude State taxation or State regulation of activities which are not part of, but affect, interstate commerce. The question is not dispositive, however, in judging the reach of the federal power to regulate, for federal power extends, under the principles stated above, to activities which are outside the stream of commerce but substantially affect it. Thus, there are many instances in which a State may tax or regulate goods and activities which are also regulated by federal law. See, *e.g.*, *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177; *Mintz* v. *Baldwin*, 289 U.S. 346.[21]

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[20] The continued vitality of the "come to rest" doctrine is open to question in the field of State taxation, but the change is towards the enlargement of State power. Compare, *e.g.*, *Brown* v. *Maryland*, 12 Wheat. 419, and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, with *Woodruff* v. *Parham*, 8 Wall. 123, and *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534.

[21] Although a State may tax a retail sale of drugs which were originally imported from other States (*Woodruff* v. *Parham*, 8 Wall. 123), Congress may regulate that sale (*United States* v. *Sullivan*, 332 U.S. 689). While goods stored in a warehouse have come sufficiently to rest to be subject to a State property tax (*Woodruff* v. *Parham*, *supra*), their storage is also subject to federal regulation (*United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86). In each of these cases the goods have in some sense "come to rest" after an interstate sale and transportation, but the power of Congress to regulate subsequent sales or use of the goods continues.

Such cases as *Weigle* v. *Curtice Bros. Co.*, 248 U.S. 285; *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176, and *Packer Corp.* v. *Utah*, 285 U.S. 105, relied upon by the State of Florida (Brief Amicus Curiae, pp. 30–33), are therefore irrelevant.

United States v. Yellow Cab Co., 332 U.S. 218, presented a similar issue (although it was decided in a statutory and not in a constitutional context). Because the government did not allege or prove that a monopoly of local taxi service would substantially interfere with or burden other interstate commerce, it was necessary to the government's case to show that the monopoly was a restraint of the channels of interstate travel itself, *i.e.*, that the taxis which carried passengers to and from the railroad stations as part of a general local business were themselves instrumentalities of interstate commerce. The Court was therefore called upon to "mark the beginning and end of a particular kind of interstate commerce by its own practical considerations" (332 U.S. at 231), and it concluded that interstate travel began and ended "at the station." The opinion also makes it clear, however, that the Court did not hold that the business of operating taxis was beyond the scope of federal regulation (*id.* at 232–233). The latter question depends, as in other cases, upon whether the activities in fact burden or obstruct, or otherwise affect, interstate commerce. *Superior Court of Washington* v. *Yellow Cab Co.*, 361 U.S. 373, summarily reversed a State injunction on the ground that the National Labor Relations Board has exclusive

jurisdiction over unfair labor practices of a similar taxi service.

B. RACIAL DISCRIMINATION IN RESTAURANTS SELLING FOOD FROM OUT-OF-STATE SOURCES BURDENS AND OBSTRUCTS INTERSTATE COMMERCE

Under the principle developed above, the power of Congress to prohibit racial discrimination in restaurants which receive a substantial portion of the food they serve directly or indirectly from out-of-State sources depends upon whether such discrimination would in fact burden or obstruct the movement of goods in interstate commerce. What affects commerce is a practical inquiry to be answered from the course of business. Cf. *Swift & Co.* v. *United States*, 196 U.S. 375, 398 ("commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). The practical inquiry, moreover, is primarily for Congress. As the Court said in *Norman* v. *Baltimore and Ohio R. Co.*, 294 U.S. 240, 311, speaking of whether the gold clauses in private bonds sufficiently interfered with the monetary policy of Congress to justify their invalidation under the power to regulate the currency—

> Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable rela-

> tion to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch* v. *Maryland*, supra, pp. 421, 423; *Juillard* v. *Greenman*, supra, p. 450; *Stafford* v. *Wallace*, 258 U.S. 495, 521; *Everard's Breweries* v. *Day*, 265 U.S. 545, 559, 562.

The same rule applies to the commerce clause. The Court held in *Stafford* v. *Wallace*, 258 U.S. 495, 521—

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and *it is primarily for Congress to consider and decide the fact of the danger and meet it.* [Emphasis added.]

See, also, *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 32; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37.

The evidence before Congress gave it ample ground for concluding that racial discrimination in restaurants that receive food from out-of-State sources is so prolific a source of burdens and obstructions to interstate commerce as to make the elimination of discrimination a reasonable means of promoting the interstate flow of goods. The evidence is presented in our brief in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term, but we repeat it here (with some additions and modifications) for the sake of completeness.

In doing so we emphasize that the relationship demonstrated is between the racial discrimination in restaurants and the flow of interstate commerce. We

have no need to argue whether the fact that a restaurant serves food which originated in other States is a sufficient basis for the regulation. While we think that it is sufficient, we assume *arguendo* that the appellees were correct, in their brief in the district court, in arguing that the power of Congress to regulate activities affecting commerce (as distinguished from the actual movement of goods in commerce) depends upon a showing that regulation of the activities could reasonably be found adapted to promoting the flow of goods.[22] For the prohibition of discrimination in

[22] Appellees' argument was that although Congress has power to regulate the interstate movement of goods and persons engaged in interstate travel, transportation or communication for any purpose, it has power to regulate local activities affecting commerce, especially in the State where the goods are received, only if it appears that the regulation of the local activities fosters the interstate commerce. In this way appellees would distinguish such cases as *Mitchell* v. *United States*, 313 U.S. 80; *Henderson* v. *United States* 339 U.S. 816; and also such authorities as the *Lottery Case*, 188 U.S. 321; *Caminetti* v. *United States*, 242 U.S. 470, and *Brooks* v. *United States*, 267 U.S. 432.

Although we are content to argue the present case upon the assumption that the power of Congress is thus limited, appellees' analysis seems erroneous. The Court has never held that Congress has power to regulate all phases of a man's conduct solely because he has previously imported goods in interstate commerce, but it has held that Congress may prohibit one who has imported interstate goods from distributing those goods in a way which is damaging to the locality. In *United States* v. *Sullivan*, 332 U.S. 689, the Court held, without dissent on this point, that Congress has power to forbid a small retail druggist from selling drugs without the form of label required by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 201, *et seq.*, even though the drugs were imported in properly labeled bottles from which they were not removed until put on the shelves of the local retailer. See also *Federal Trade Commission* v. *Mandel*

covered restaurants falls squarely within that proposition.

1. Racial discrimination in restaurants serving food from out-of-State is a prolific source of disputes burdening and obstructing interstate commerce

Where a restaurant serves food received from interstate commerce, either directly or indirectly, any dispute involving the establishment which causes it to close or reduces its patronage will curtail its purchases and thus diminish the flow of goods in interstate commerce. Current history makes plain the tendency of a practice of racial discrimination to produce such disputes with the consequent interruption in the flow of goods from other States. The situation is the same in principle, therefore, as the countless cases in which the courts have sustained the application of the National Labor Relations Act to establishments receiving goods in interstate commerce on the ground that a labor dispute at such an

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Bros., 359 U.S. 385; *McDermott* v. *Wisconsin*, 228 U.S. 115. The restaurateur practicing racial segregation who purchases food originating in another State for service in a commercial restaurant, is using interstate commerce to perpetuate an evil. While Congress could not regulate his conduct merely because he had imported the goods some time in the past, it can, if it judges discrimination an evil, prohibit him from using the channels of interstate commerce to bring into the State the goods which are the tools of the discrimination. And where Congress can close the channels of commerce to those using out-of-State goods to pursue an injurious practice, it can also forbid using the goods in the practice itself. Compare *United States* v. *Darby*, 312 U.S. 100, 122. See, also, the analysis of Professor Paul A. Freund, S. Rep. 872, 88th Cong., 2d Sess., pp. 82–83.

establishment might result in a strike or other concerted activity that would curtail the interstate movement of goods. See pp. 30–32 above.

The commercial problem has had nationwide scope and almost incredible proportions. The Attorney General testified before the Senate Judiciary Committee that between May 20 and July 31, 1963 (the date of his testimony) there were 639 demonstrations in 174 cities, 32 States, and the District of Columbia. Of these, 302 were concerned solely with discrimination in places of public accommodation.[23] Assistant Attorney General Marshall wrote Senator Javits on April 14, 1964, furnishing later figures (110 Cong. Rec. 7980 (daily ed.)). From May 1963 to April 1964, a total of 2,422 racial demonstrations took place, of which 850 arose from disputes about discrimination in places of public accommodation. The Mayor of Atlanta, Georgia, testified in favor of enactment that "[f]ailure by Congress to take definite action at this time * * * would start the same old round of squabbles and demonstrations that we have had in the past."[24]

The effect upon business conditions and, therefore, on interstate commerce is obvious. The most immediate impact upon restaurants and lunch counters which either refuse to serve Negroes or segregate their facil-

[23] Hearings before the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. 1731, p. 216.

[24] Report of the Committee on Commerce, United States Senate, on S. 1732, No. 872, 88th Cong., 2d Sess. (February 10, 1964), at 15, 21, quoting Mayor Ivan Allen, Jr. This report is hereafter cited as "*Senate Commerce Report*."

ities has come in the form of sit-in demonstrations. The purpose and effect of a sit-in is, of course, to prevent sales of food as completely as would a strike of the employees of the business. The ultimate result is to eliminate purchases of out-of-State food and supplies. But sit-ins and their effects represent only the beginning of the forms of demonstration and the impact on interstate commerce. Under Secretary of Commerce Roosevelt testified that "[i]t is common knowledge that discrimination in public accommodations and demonstrations protesting such discrimination have had serious consequences for general business conditions in numerous cities in recent years." *Hearings before the Committee on Commerce,* United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. 27, at 699.[25] The examples he describes are impressive.

Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. Businessmen stated that there were more business failures than during the depression. Downtown stores privately reported that their sales in April of that year were off 40 to 50 percent. They were hit first by a Negro boycott and then by a tense atmosphere that kept customers at home or in suburban shops. The Federal Reserve Bank showed department store sales in Birmingham in the four-week period ending May 18, 1963, down 15 percent over the same period in 1962. During the same period, de-

[25] These hearings are hereafter cited as "*Senate Commerce Hearings*."

partment store sales were up in Atlanta, New Orleans, and Jacksonville. *Ibid.*

Other cities suffered similar experiences. In Atlanta, Mr. Roosevelt testified, "after several months of intermittent demonstrations in 1960–1961, and a boycott sparked by student groups to remove racial barriers in lunch counters and department store restaurants, merchants agreed that the Negro boycott of the downtown area was almost 100 percent effective." Department store sales for a one-week period in February 1961 were down 12 percent from the preceding year, according to the Federal Reserve Bank. *Senate Commerce Hearings,* at 699–700. In Savannah, lunch-counter discrimination in downtown stores finally ended following "a 15-month boycott of the stores by Negroes * * *." This boycott "cut retail sales as much as 50 percent in some places." In the fall of 1962 businessmen in Charlotte, North Carolina, "hit by drives for desegregation of public accommodations, estimated their business was cut by 20 to 40 percent." In Nashville, Tennessee, a boycott was maintained for seven weeks at 98 percent efficiency (*Senate Commerce Hearings,* at 700):

> Negroes in Nashville spend an estimated $7 million annually downtown and their absence had varying results. In one department store, they represented 12 to 15 percent of the business; in another department store, 5 percent. The transit company found its revenues dwindling seriously; the two newspapers found advertising lineage figures falling.

"Variety stores," Mr. Roosevelt continued, "were hit particularly hard. With their lunch counters a

sit-in target, even those who did venture downtown avoided the food counters, which sometimes account for as much as 50 percent of the gross profit. Even businessmen not involved in the sit-ins and which had reputations of good service to Negroes found business dropping." *Ibid.*

It is evident that such a general downturn in retail business must, if left unchecked, result in serious disruption in the flow of goods across State lines. If retail stores cannot sell, they in turn will not buy from wholesalers, who in turn must necessarily reduce their out-of-State purchases. In a highly interdependent economy, as Congressman McCulloch observed, "a local disturbance can affect the commerce of an entire State, region, and the country." [26] Or, as a "top retail executive" said, "[t]his thing has frightening ramifications. It is more serious than people realize. It has now become an economic situation affecting an entire community, the whole city, and the whole country." [27]

Less obvious, but likewise important, is the impact of racial disputes and civil unrest upon the flow of investment. Congress was told of companies which had decided, because of such disputes, not to open plants and offices in Birmingham and Montgomery.[28] Congressman McCulloch, summarizing the evidence, stated: "The segregation of public accommodations

[26] "*Additional Views*" of Congressmen McCulloch, Lindsay, and other Republican committee members, filed in support of the Report of the House Judiciary Committee, 88th Cong., 1st Sess., No. 914, Part 2, on H.R. 7152 (December 2, 1963) at 12. This document is hereafter cited as "*Additional Views*."

and other sources of racial unrest in Birmingham, Ala., have induced many businesses to reconsider their plans to move into or to expand their existing operations in the area." *Additional Views, supra,* at 12.

The story had been the same in Little Rock. As Under Secretary Roosevelt testified (*Senate Commerce Hearings,* at 699):

> In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to $190 million from $248 million of the 2 years before desegregation.

The Secretary of Labor drew this conclusion (*Senate Commerce Hearings,* at 623):

> Industry is discouraged from locating or expanding in communities where equal opportunity does not exist and incidents have taken place or are likely to occur. Lack of equal

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[27] Report of the Legislative Reference Service, Library of Congress, to the Chairman of the Senate Commerce Committee, "An Episode Account of Economic Effect of Segregation and Resistance to Segregation in the South," *Senate Commerce Hearings,* at 1384.

[28] *Id.* at 1385.

746-011—64——5

facilities for employees and even the latent possibility of demonstrations often removes the locality from consideration as a site for commercial or industrial expansion. This affects industrial development regionally and nationally by limiting the flexibility and free choice of business and hampering labor mobility.

2. Racial discrimination in restaurants serving food from out of State artificially restricts the market for goods moving in interstate commerce

The reduction in the business—and therefore in the purchases of goods from other States—of a restaurant which is involved in a racial dispute is not the only, or even the most direct, effect upon interstate commerce caused by racial discrimination. A second and still more direct link between discrimination and interstate commerce is the reduction in the number of potential customers caused by the discouragement of Negro patronage—which in turn reduces the quantity of goods purchased through interstate channels. As the Attorney General testified (*Senate Commerce Hearings,* at 18–19): "Discrimination by retail stores which deal in goods obtained through interstate commerce puts an artificial restriction on the market and interferes with the natural flow of merchandise." See, also, testimony of Senator Magnuson, 110 Cong. Rec. 7174 (daily ed.).

It is clear that the aggregate effect of racial discrimination by restaurants is substantially to restrict the market for food. Indeed, that is simply a truism. Not only do established businesses sell less but many new businesses are not opened, because of the narrowed market resulting from the exclusionary

practices. This restriction on the market, in turn, retards the flow of goods in interstate channels. To avoid that result Congress may go to the cause.

The testimony of Under Secretary Roosevelt is revealing with respect to the effect of policies of racial exclusion in retail establishments, including restaurants, on the scope of the market for food and other products. His testimony was that Negroes spend less money per capita, *after discounting income differences,* than do whites in restaurants, theaters, and the like, and that the disparity is especially aggravated in the South where such exclusionary practices are widespread. He attributed this to racial discrimination. *Senate Commerce Hearings,* at 695.

The Under Secretary illustrated the point by showing that "Negroes in large northern cities spend more than southern Negroes of the same income class in all of these expenditure categories [*i.e.*, restaurants, theaters, recreational facilities, hotels, motels] * * *, even though white families in northern cities spend less than similar families in southern cities." "In the same income group," he said, "northern Negroes spend more than northern whites for [theaters and recreation], but southern Negroes spend less than southern whites and northern Negroes. Negroes in both the North and South spend less on 'Food eaten away from home' than white people in the same income groups, but the difference is much greater in the South." *Ibid.*[29]

[29] The statistics furnished Congress by the Commerce Department are set out in Appendix B to Brief for the United States in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, p. 70.

The Secretary of Labor gave similar testimony. *Senate Commerce Hearings,* at 623, 624, 626, 630.

The district court, citing *Tot* v. *United States,* 319 U.S. 463, 467–468, seems to suggest that to legislate upon the ground that there is a relationship between racial discrimination in places of public accommodation and interstate commerce is unconstitutional "because of lack of connection between the two in common experience" (R. 49). We submit, with due respect, that the evidence before Congress shows that the court's declaration flies in the face of established fact.

It is obvious, of course, that the volume of goods purchased by any restaurant, viewed in isolation, has scant effect upon the total volume of goods moving in interstate commerce. Here, appellees were receiving annually about $70,000 worth of meat from out-of-State sources. But the size and volume of purchases of the individual establishment are not conclusive. Also "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Labor Board* v. *Reliance Fuel Corp.,* 371 U.S. 224, 226. As the Court held in *Wickard* v. *Filburn,* 317 U.S. 111, 127–128:

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

To the same effect, see *Polish National Alliance* v. *Labor Board*, 322 U.S. 643; *Labor Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 685, n. 14; *Labor Board* v. *Fainblatt*, 306 U.S. 601.

Congress was also entitled to judge the importance of the commercial relationship between racial discrimination in restaurants and the interstate flow of goods in the light of the data showing that the obstructions were widespread, confined to no single city, State or even region, but part of a nationwide problem. Discriminatory practices in one restaurant in Birmingham are not unrelated to racial discrimination in other restaurants in Birmingham, and also in hotels, motels, theaters and other places of public entertainment. Discrimination in Birmingham and the resulting disturbances are not unrelated to racial discrimination in Chicago, Los Angeles and New York. While Congress was careful to cover only establishments where discrimination would have an individual link to interstate commerce through the receipt of out-of-State goods, it was entitled to judge the importance of that link in the light of its knowledge that the discrimination and resulting threat of disturbances at any one establishment was part of a complex and interrelated pattern. Cf. *Wickard* v. *Filburn*, 317 U.S. 111.

It is also immaterial whether a dispute had occurred or was imminent at appellees' restaurant. In *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 222, the Court held—

> But it cannot be maintained that the exertion of federal power must await the disruption of

> that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Similarly, in dealing with the threat to commerce arising from a practice of racial discrimination Congress "was entitled to provide reasonable preventive measures"; that was the object of Title II of the Civil Rights Act.

3. The absence of an explicit recital that racial discrimination in restaurants serving food from out-of-State sources burdens interstate commerce does not invalidate Title II

Appellees, if we may judge from their brief in the district court, do not challenge the basic constitutional principles upon which we rely; nor did they offer to prove that there was no evidence upon which one could reasonably conclude that the prohibition of racial discrimination in covered places of public accommodation was adapted to eliminating a cause of obstructions to the free flow of goods in interstate commerce. Indeed, both they and the court below (R. 45–46) seem to agree that the Labor Board cases would be controlling if Congress had made a more explicit finding that discrimination affects commerce comparable to the findings in the National Labor Relations and Fair Labor Standards Acts, and if there were provision for *ad hoc* inquiry into whether the discrimination at a particular restaurant has that effect. From the absence of such provisions appellees and the court below leap to the conclusion that "Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of

whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce" (R. 48).

The absence of formal declared findings neither warrants that conclusion nor invalidates the statute. Such recitals are contained in some statutes[30] and omitted from others.[31] Their presence may aid the Court in understanding the factual predicate of particular legislation but they are not essential. The Court has often sustained statutes regulating activities affecting commerce even though there was no express legislative declaration. See, *e.g.*, *Southern Ry. Co.* v. *United States*, 222 U.S. 20; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U.S. 612; *United States* v. *Ferger*, 250 U.S. 199; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515; *United States* v. *Sullivan*, 332 U.S. 689; *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 391.[32]

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[30] See, *e.g.*, Securities Exchange Act of 1934, 15 U.S.C. 78b; Trust Indenture Act of 1939, 15 U.S.C. 77bbb; National Labor Relations Act, 29 U.S.C. 141; Fair Labor Standards Act, 29 U.S.C. 201.

[31] See, *e.g.*, Railway Labor Act, 45 U.S.C. 151; Safety Appliance Acts, 45 U.S.C. 8, 49 U.S.C. 26; Bill of Lading Act, 49 U.S.C. 121; Fur Products Labelling Act, 15 U.S.C. 69; Automobile Information Disclosure Act, 15 U.S.C. 1231; Textile Fiber Products Identification Act, 15 U.S.C. 70.

[32] The passage concerning the necessity of findings quoted by the district court from Mr. Justice Black's concurring opinion in *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 651–653, is taken out of context. He was addressing himself to the substantive posture in which the case was put by the action of the Labor Board, and speaking of administrative

The fatal error in appellees' argument is that it reverses the normal presumption of constitutionality and asks the Court to assume, because of the absence of formal recitals, (i) that Congress ignored the commercial consequences of racial discrimination that would support the legislation and (ii) that Congress proceeded exclusively upon another ground. To attribute to Congress an improper theory where there are ample constitutional grounds for its action is contrary to settled principles of constitutional adjudication. The Court has repeatedly held, "A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there is no transgression of power by Congress—all the members of which act under an oath of fidelity to the Constitution * * *. It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution," *Legal Tender Cases,* 12 Wall. 457, 531. "Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law * * *. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to

findings. The Court has frequently required explicit findings by an administrative agency before sanctioning its regulation of activities that would be within the scope of State power but for the agency's intervention. *E.g., Florida* v. *United States*, 282 U.S. 194, 211–212; *City of Yonkers* v. *United States*, 320 U.S. 685. These were the principal cases cited by Justice Black.

the Congress." *United States* v. *Butler*, 297 U.S. 1, 67. See, also, *Sinking Fund Cases*, 99 U.S. 700, 718; *United States* v. *Harris*, 106 U.S. 629, 635.[33]

One well-settled corollary is that neither proof nor legislative findings are required where the constitutionality of legislation turns upon whether conditions exist which might lead the legislative body to conclude that the challenged measure was a means reasonably adapted to a permissible objective. The Court dealt with the point explicitly in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152:

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not

[33] A similar presumption applies where the constitutionality of a State statute regulating business activities is challenged. See *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 584, and cases there cited at note 1; *South Carolina Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 191–192, where it was said: "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." See, also, *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594; *McGowan* v. *Maryland*, 366 U.S. 420, 426.

The presumption probably does not apply to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4. Nor are we dealing here with a situation in which "legislation appears on its face to be within a specific prohibition of the Constitution * * *." *Ibid.*

> to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Compare *Townsend* v. *Yeomans*, 301 U.S. 441, 451–452.

In the present case evidence was presented to Congress, showing that racial discrimination in places of public accommodation created a commercial problem of national magnitude. See pp. 38–44, above. Except where it was dealing with discrimination supported by State action in violation of the Constitution (Section 201 (a) and (d)), Congress prohibited discrimination only in those establishments which have a close and intimate tie to interstate commerce—in the case of restaurants, through serving food which comes from out of State. The natural conclusion is that Congress decided that discrimination in the establishments thus linked to commerce so burdened and obstructed that commerce as to require the legislation. We think that Section 201(b) amounts to a declared finding of that fact, but even if it does not, plainly appellees have failed to make the required showing "that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" (*United States* v. *Butler*, *supra*).

Appellees' argument also fails upon a second, settled point of constitutional adjudication. Where legislation is clearly appropriate to the exercise of a granted power, the courts may not investigate the legislature's

reasoning with a view to attributing to Congress an impermissible objective and thereby invalidating the legislation. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 546; *McCray* v. *United States,* 195 U.S. 27, 54–55; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 160–163; *Arizona* v. *California,* 283 U.S. 423, 454–457.[34] Where an Act of Congress is seen to be reasonably adapted to an objective within the delegated powers of Congress—here the protection of interstate commerce—and it offends no express limitation, the judicial function is exhausted. *McCulloch* v. *Maryland,* 4 Wheat. 316, 420.

4. Title II is not invalidated by the absence of provision for an administrative or judicial finding whether discrimination in an individual restaurant affects interstate commerce, before bringing it within the coverage of the Act

In the district court appellees also argued that Title II could not be sustained as a regulation of local activities affecting interstate commerce because the statute does not provide for an individual *ad hoc* decision, by a court or administrative agency, as to whether racial discrimination in the particular establishment will affect interstate commerce. The argument has no support in the authorities and is inconsistent with the implicit holding of a long line of decisions. It is also unsound in principle.

[34] This is not to say that a statute which is obviously designed to reach a forbidden objective is saved because another merely colorable purpose is cited in justification. Nor is the usual "insulation" from judicial review "carried over when state power is used as an instrument for circumventing a federally protected right," *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347.

Section 201 prohibits racial discrimination in any restaurant where a substantial portion of the food served comes from another State. In enacting the prohibition Congress determined for itself that racial discrimination in such an establishment, when viewed as one of many similar enterprises, does, in fact, create such a danger of obstructing interstate commerce as to warrant protective legislation. With that fact—that part of the link between discrimination and commerce established—there remains only the question whether a particular restaurant receives goods from out of State. The latter issue is subject to judicial determination in every case.

There is no constitutional requirement that the relation between interstate commerce and a particular practice like racial discrimination be left to *ad hoc* litigation in each particular case. In *United States* v. *Darby*, 312 U.S. 100, 120–121, the Court noted the variations in legislative practice and approved a legislative determination of the relation:

> In such legislation [*i.e.* legislation regulating activities intrastate] Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes

> Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger, supra*; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515, 553.

There was no provision for trial of the question whether the lack of a safety appliance upon a particular piece of rolling stock used in intrastate commerce endangered interstate commerce, *Southern Ry. Co.* v. *United States,* 222 U.S. 20; of whether the hours of labor of back shop employees would interfere with the operation of interstate trains, *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U.S. 612; of whether the issuance of a particular forged bill of lading interfered with commerce, *United States* v. *Ferger,* 250 U.S. 199; or of whether the growing of wheat in excess of the allotment to Filburn's farm would disrupt interstate markets, *Wickard* v. *Filburn,* 317 U.S. 111.

Contrary to the opinion below (R. 46), the course followed in Section 201 of the Civil Rights Act of 1964 closely parallels the scheme of Sections 6, 7, and 15(a)(2) of the Fair Labor Standards Act. The constitutionality of the latter rests upon the ground that the payment of substandard wages to employees engaged in the production of goods for commerce, while

not itself commerce, nevertheless so obstructs and burdens commerce as to be subject to federal regulation. *United States* v. *Darby,* 312 U.S. 100, 117-121. That issue was resolved by Congress. The sole question left for judicial determination was whether the particular goods were produced for commerce. In the present instance Congress itself has said that discrimination in a restaurant which, directly or indirectly, receives goods in commerce, threatens to obstruct or burden that commerce. The only question left for judicial determination is whether the particular restaurant receives goods in commerce. The parallel is complete, and the holding in *United States* v. *Darby* is therefore precisely applicable to the present case.[35]

Indeed, appellees' effort to distinguish the National Labor Relations Act rests upon a misunderstanding of the operation of that statute. Although the Act empowers the Board to prevent unfair labor practices and resolve questions of representation affecting commerce and provision is made for administrative hearing, the Board's inquiry upon this point never goes beyond the relationship between the employer's business and interstate commerce, such as the shipment or receipt of interstate goods. The Board has never made case-by-case inquiries into whether discrimination against union members or other unfair labor prac-

[35] The very argument made by appellees here was presented in *United States* v. *Darby*, and rejected by the Court in the portion of the opinion quoted above. See Brief for Appellee, No. 82, October Term 1940, pp. 76–77.

tices in the particular shop might give rise to a labor dispute which might curtail shipments or orders and so affect interstate commerce. Were an employer to tender proof upon the issue, it would be excluded. Just two terms ago this Court reversed a holding of the Second Circuit setting aside a decision of the Board for lack of "findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." This Court held that findings as to the quantity of out-of-State oil purchased by Reliance from local wholesalers were alone sufficient. *Labor Board* v. *Reliance Fuel Co.*; 371 U.S. 224; see, also, *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Labor Board* v. *Phoenix Mutual Life Insurance Co.*; 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845. The adequacy of such findings is also apparent both from the Board's consistent practice and from the lead cases and press releases announcing yardsticks for the exercise of jurisdiction. See *Siemons Mailing Service*, 122 N.L.R.B. 81; *Sioux Valley Empire Electric Assn.*, 122 N.L.R.B. 92. Evidently the Board feels that Congress itself found that unfair labor practices in businesses closely related to commerce have a tendency to obstruct it, leaving open only the existence of a link between the particular business and interstate commerce. If so, the situation under the National Labor Relations Act is indistinguishable from Title II. If the general rule is Board-made, the power of Congress is certainly not less.

CONCLUSION

Although we contend that Congress has, and has exercised, the power to prohibit racial discrimination in places of public accommodation (as defined in Title II), because the discrimination is a prolific source of burdens and obstructions to interstate commerce, we do not suggest that Congress was uninfluenced by the conviction that racial discrimination in public places is a grave moral wrong, lying heavy on the conscience of the entire Nation, which belies the ideals of America. Faced with the need for meeting the commercial problem, Congress was free to choose the remedy adapted to that end which it believed would be most effective, most conducive to the public welfare, and most consistent with the promise of America to all sorts and conditions of men.

Similarly, it is irrelevant whether racial discrimination in restaurants be called a commercial practice or a social custom. If a social custom is carried over into business enterprises, which are subject to legislative regulation, and there becomes a source of burdens or obstructions to interstate commerce, Congress has the same power to prohibit the practice, as a means of protecting commerce, as it would have if the practice were in commerce itself. And the power to prohibit racial discrimination in commerce is too plain for argument. *Mitchell* v. *United States*, 313 U.S. 80, 94; *Henderson* v. *United States*, 339 U.S. 816; *Boynton* v. *Virginia*, 364 U.S. 454.

The power of Congress under the commerce clause and "necessary and proper" clause is broad and

sweeping. It may be argued that such power is subject to abuse. The answer to such arguments, when Congress keeps within its sphere and violates no express constitutional limitation, was voiced by Chief Justice Marshall one hundred and forty years ago in *Gibbons* v. *Ogden,* 9 Wheat. 1, 197:

> The wisdom and the discretion of the congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Here, then, as on most other aspects of the case, the governing principles go back almost to the founding of the Republic.

The Civil Rights Act of 1964 was debated longer, more widely and more conscientiously than any legislation in recent decades. Title II is plainly appropriate to resolving what was, in a major aspect, a national commercial problem within the reach of Congress under the power to regulate interstate commerce. Title II violates no express limitations such as are contained in the Bill of Rights. No other issue remains.[38]

The judgment below should therefore be reversed, both because the court below had no equity jurisdic-

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[38] The questions raised below by appellees under the First, Fifth and Thirteenth Amendments appear to require no answer beyond our brief in *Heart of Atlanta Motel, Inc.* v. *United States,* No. 515, this Term.

tion and because Title II, as applied to appellees' restaurant, is constitutional.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

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INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement	3
Substantiality of Questions	4
Summary of Argument	5
Argument:	
I. Title II in its general plan and as applied to appellants is not a valid exercise of the power of Congress under the commerce clause	8
1. For Congress to regulate an intrastate activity it must be shown that there is close and substantial relationship to interstate commerce	8
2. Neither the Agricultural Adjustment Act of 1938 nor Wickard v. Filburn is a precedent for upholding Title II	12
3. The National Labor Relations Act is not a statutory precedent	14
4. Title II applies to conduct which does not affect commerce	18
(a) The Interstate Traveler presumption is invalid	19
(b) The Food presumption is invalid	21
5. The effect on commerce is related to a restaurant's operations not racial segregation	25

6. Title II was not concerned with market impact but with social problems 27
7. The decision and opinion of the Court below are correct 28

II. Title II of the Civil Rights Act violates the due process clause of the 5th Amendment 30

III. The district court properly exercised its Equity jurisdiction 36

Conclusion 42

Cases Cited.

Adler v. Board of Education, 342 U. S. 485 37
A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 10
Bates v. Little Rock, 361 U. S. 516 33
Beal v. Missouri Pacific R. R., 312 U. S. 45 39
Bell v. Maryland, ... U. S. ..., 12 L. Ed. 2d 822, 858 32
Boynton v. Virginia, 364 U. S. 454 20
Browder v. Gayle, 142 F. Supp. 707, 715 (M. D. Ala.) (per Rives, J.) aff'd per curiam 352 U. S. 903 33
Buchanan v. Warley, 245 U. S. 60, 74 .....31, 34, 74
Butts v. Merchants Transportation Co., 230 U. S. 126 29
Carter v. Carter Coal Co., 298 U. S. 238 .....37, 41
Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446 41
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 531 .....41, 42
Currin v. Wallace, 306 U. S. 1 .....34, 37
Detroit v. Detroit Citizen Street Ry. Co., 184 U. S. 368, 378-81 42
Douglas v. Jeannette, 319 U. S. 157 38

Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959) 20
Euclid v. Ambler Realty Co., 272 U. S. 365, 386 41
Florida v. United States, 282 U. S. 194 9
Garifine v. Monmouth Jockey Club, 29 N. J. 47, 148 A. 2d 1 35
Gibson v. Florida Legislative Committee, 372 U. S. 539 33
Gibbons v. Ogden, 9 Wheat. 1 8
Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48 (C. A. 2) 32
Greene v. McElroy, 360 U. S. 474 31
Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342 .....9, 10
Howard v. Illinois Central R. R. Co., 207 U. S. 463 .. 8
Hygrade Provision Co. v. Sherman, 266 U. S. 497 ..38, 39
International Ass'n of Machinists v. Street, 367 U. S. 740 33
Louis K. Liggett Co. v. Baldrige, 278 U. S. 105, 111 31
Meyer v. Nebraska, 262 U. S. 390, 399 31
Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773, 776 (Utah) 35
N. L. R. B. v. Fainblatt, 306 U. S. 601 17
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 .. 16
NLRB v. Reliance Fuel Oil Corp., 371 U. S. 224 24
Palmer v. Massachusetts, 308 U. S. 79 9
Pennsylvania v. West Virginia, 262 U. S. 553 .....37, 41
Perkins v. Lukens Steel Co., 310 U. S. 113, 127 ... 32
Peterson v. Greenville, 373 U. S. 244, 250 32
Pierce v. Society of Sisters, 268 U. S. 510, 525. .31, 32, 37, 41
Poe v. Ullman, 367 U. S. 497 37
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Public Utilities Comm'n of California v. United States, 355 U. S. 534 37
Railway Mail Ass'n v. Corsi, 326 U. S. 88 37
Spielman Motor Co. v. Dodge, 295 U. S. 89 38
Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256 .. 32
The Civil Rights Cases, 109 U. S. 3 29
Tot v. United States, 319 U. S. 463 .....6, 19
Traux v. Corrigan, 257 U. S. 312 31
United Public Workers v. Mitchell, 330 U. S. 75 37
United States v. Darby, 312 U. S. 100 8
U. S. v. Yellow Cab Co., 332 U. S. 218 20
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 12 38
Watson v. Bush, 313 U. S. 387 39
West Virginia State Board of Education v. Barnette, 319 U. S. 624 .....27, 33
Wickard v. Filburn, 317 U. S. 111 ....5, 7, 10, 12, 13, 27, 40
Williams v. Howard Johnson's Restaurant, 268 F. 2d 845, 847 (C. A. 4) 20, 35
Yonkers v. United States, 320 U. S. 685 9
Yu Cong Eng v. Trinidad, 271 U. S. 500, 526-27 31

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Charles A. Reich, "The New Property," 73 Yale Law Journal 733, 771 (1964) 33

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.[1]

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Alabama, is not yet reported. A copy of that opinion is attached to appellants' jurisdictional statement (Appendix A) and is not reproduced in this brief.

[1] Pursuant to the Joint Motion to Expedite Briefing and Oral Argument, filed on September 24, 1964, appellees state herein their response to appellant's jurisdictional statement filed on September 28. Since under that motion simultaneous opening briefs are required on October 2, no statement of facts has been made by appellants. The facts are succinctly stated in the lower Court's findings. Appellants' Jurisdictional Statement, Appendix A, at pp. 7-9.

JURISDICTION.

Appellants' statement relating to the jurisdiction of this Court is accepted as correct except that portion thereof which confines the decision and opinion of the District Court to a restaurant which serves food a substantial portion of which has moved in commerce. Since the holding of the District Court was to the effect that Title II of the Civil Rights Act of 1964 as applied to the business operated by appellees was beyond the competence of Congress and that Court's opinion is presented on this appeal, it is not deemed necessary to interpret further the lower Court's holding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The appellants' statement of constitutional and statutory provisions involved is accepted by appellees.

QUESTIONS PRESENTED.

Appellees consider appellants' statement of questions presented inadequate. Additional questions are presented as follows:

3. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it relates to restaurants.

4. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it relates to places of public accommodation generally.

STATEMENT.

Appellees accept appellants' statement with the following exceptions:

1. Appellants state that "the gravamen of the complaint is that appellees' business is 'essentially local in character' ". Appellees consider that the gravamen of their complaint is that Title II of the Civil Rights Act of 1964 is unconstitutional as applied to them.

2. Appellants state that "the government's motion to dismiss asserted that 'no case or controversy' was presented within the meaning of Article III of the Constitution". The record will reveal that no such ground or language was asserted in the motion to dismiss (R. 16-17).

3. Appellants further state that such motion asserted "that appellees were not threatened with any injury sufficient to justify the exercise of equity jurisdiction". The motion contained no such assertion or language (R. 16-17).

4. Appellants state that the holding of the District Court was "premised upon its view that, although a substantial portion of the food served by the restaurant is obtained through interstate channels, it comes to rest before being sold by the restaurant and hence is no longer subject to federal regulation under the commerce clause". Appellees consider that the opinion of the District Court speaks for itself, but strenuously challenge the foregoing statement and insist that the holding of the District Court was not premised upon any such view. To the extent that it is appropriate for a party to undertake in the statement of a case to interpret the holding of the lower Court appellees state that the decision below was premised upon the view that Title II of the Civil Rights Act of

1964 was drafted so as to regulate by virtue of a conclusive presumption conduct which in many instances will not affect interstate commerce at all.

THE QUESTIONS ARE SUBSTANTIAL.

Appellees accept appellants' statement as to the substantiality of the questions presented.

SUMMARY OF ARGUMENT.

It is appellees' contention that Title II of the Civil Rights Act of 1964, both as to appellees and to restaurants generally, is unconstitutional.

Conceding that Congress has the power to regulate local and wholly intrastate activities under certain circumstances, appellees contend that such power may be exercised only where it is shown that there is a close and substantial relationship with interstate commerce. In Title II, Congress has employed statutory means which result in application of the statute to local activities over which Congress has no authority by virtue of the commerce clause.

In the Agricultural Adjustment Act of 1938, 7 U. S. C. 1281, et seq., the constitutionality of which was upheld by this Court in **Wickard v. Filburn**, 317 U. S. 111, Congress determined, inter alia, that the regulation of producer consumed wheat was necessary in order to effectuate the overall plan and purpose of the legislation, i. e., to stabilize prices through the control of the supply and demand of the farm commodities covered.

The statute, in its application to wholly local and intrastate activities of the kind presented by Filburn's case was upheld by this Court on the basis of congressional findings that such local production and consumption, in supplying a need which would otherwise be reflected by purchases in the open market, would have a substantial effect on interstate commerce. The case recognized that a finding of such a cumulative effect on commerce was within the competence of Congress.

Title II of the Civil Rights Act of 1964 shows on its face that it was not conceived or drafted so as to come within the rationale of Wickard v. Filburn. It contains

no legislative findings and the provisions of the Act itself reject the implication of such since it purports to apply only to individual restaurants found to "affect commerce".

Another statute regulating local matters which has been relied upon by the proponents of the Civil Rights Act of 1964, is the National Labor Relations Act, 29 U. S. C. 151, et seq. In that statute Congress provided for the regulation of labor disputes which in most instances would be purely local and only indirectly related to interstate commerce. Recognizing this, Congress provided for a case-by-case determination of an effect on commerce by either the National Labor Relations Board or the courts. Unlike the Agricultural Adjustment Act, it did not purport to depend upon a finding of a cumulative effect of multiple local activities upon interstate commerce. The Labor Act sought to bring the power of Congress to bear only upon labor disputes found on a record to affect commerce.

When Title II purports to apply, so as to present a superficial resemblance to the National Labor Relations Act, only to those activities which "affect commerce", it employs what the Court below has characterized as "sophisticated means" to short circuit and eliminate any inquiry as to an actual effect on commerce in the individual case. This is accomplished by a conclusive presumption that the operations of a restaurant affect commerce if, first, it serves or offers to serve interstate travelers or, second, a substantial portion of the food which it serves has moved in commerce.

Neither aspect of this conclusive presumption can be sustained. See **Tot v. United States**, 319 U. S. 463.

Furthermore, in Title II, it is not required that there be any connection (even on the basis of the conclusive

presumption mentioned) between the racial policy of a particular restaurant and interstate commerce. Instead, the "affect commerce" technique is keyed to the "operations" of the restaurants generally. This technique, if approved, allows Congress to exert unlimited control over commercial and personal conduct which might not in fact affect commerce at all.

Since Title II of the Civil Rights Act of 1964 was not conceived as an interstate commerce measure, but rather to solve what was considered to be a serious social problem, its legislative history understandably contains no basis for the kind of findings that would have been necessary to sustain this legislation on the basis of the rationale of **Wickard v. Filburn**, supra.

Because of the means employed, Title II of the Civil Rights Act of 1964, as applied to appellees and to restaurants generally, does not fall within the legitimate limits of the commerce power granted to Congress. Since it necessarily encroaches upon the rights of appellees and other restaurant owners to use their property and to furnish their services in the manner they choose, it violates the 5th Amendment of the Constitution.

Since this record shows that appellees have failed to comply with pertinent provisions of Title II in specific instances and since appellants have indicated a firm intention to enforce the provisions of the Act, no serious question can be raised that appellees are entitled to injunctive relief.

ARGUMENT.

I. Title II in Its General Plan and as Applied to Appellants Is Not a Valid Exercise of the Power of Congress Under the Commerce Clause.

Appellees do not contend that Congress may not legislate with respect to racial discrimination. Nor do they contend that it may not, acting under the commerce clause, prohibit racial segregation in certain places of public accommodation, including many restaurants.

What they do contend is that Congress has in Title II of the Civil Rights Act of 1964 undertaken to regulate some restaurants (including appellees') over which it has no authority under the commerce clause; that it is, therefore, unconstitutional both as to appellees and as to restaurants generally. **Howard v. Illinois Central R. R. Co.**, 207 U. S. 463.

1. For Congress to Regulate an Intrastate Activity It Must Be Shown That There Is a Close and Substantial Relationship to Interstate Commerce.

There can be no question that Congress has the power to regulate local and intrastate activities that are not themselves a part of, but which are reasonably related to, interstate commerce. While such a power is not expressly given under the Constitution, it has been recognized as reasonably implied since at least **Gibbons v. Ogden**, 9 Wheat. 1.

The question then is not whether such a power over local activities exists, but whether this legislation has been enacted within its proper limits.

In **United States v. Darby**, 312 U. S. 100, this Court stated:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it so as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce (312 U. S. at 118, 119).

Thus the Court recognized that the power under the commerce clause extends to those intrastate activities which are sufficiently related to justify their regulation in carrying out the purpose of the commerce clause, i. e., the regulation of interstate commerce per se. But the courts have also recognized that where purely local and intrastate activities are involved, there must be a "suitable regard" to the principle that in such cases the justification for regulation must clearly appear. **Yonkers v. United States**, 320 U. S. 685, and cases there cited; **Florida v. United States**, 282 U. S. 194; **Palmer v. Massachusetts**, 308 U. S. 79; **Houston, E. & W. T. R. Co. v. United States**, 234 U. S. 342; see concurring opinion of Justice Black in **Polish National Alliance v. N. L. R. B.**, 322 U. S. 643.

The principle that the regulation of a purely local activity requires a clear showing that such a regulation is appropriate to carrying out the primary power of Congress to regulate interstate commerce is deeply embedded in our law and represents nothing more than a recognition that, since all federal power must derive from the Constitution, matters which are not within an express grant of congressional power cannot be touched by federal hands unless it be shown that the regulation is necessary and proper in the exercise of a power expressly given. Where the interstate commerce clause is relied upon there must be at least a substantial and close effect on commerce.

It has been said that the effect must be "direct", that "indirect" effects are not covered. In this connection we might appropriately recall the words of Justice Cardozo, concurring in **A. L. A. Schechter Poultry Corp. v. United States**, 295 U. S. 495, where he stated:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. (295 U. S. 559.)

It is not contended here that there is any magic in the word "direct." Inevitably it becomes a question of degree. In **Wickard v. Filburn**, 317 U. S. 111, the Court stated as to this point:

> In some cases sustaining the exercise of federal power over interstate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material"; and in others it was not used at all. Of late, its use has been abandoned in cases dealing with questions of federal power under the commerce clause.
>
> In the Shreveport Rate Case **(Houston E. & W. T. R. Co. v. United States)**; 234 U. S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government

> because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a **close and substantial** relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." (Emphasis added.) 317 U. S. 111.

Many other examples of the Courts' recognition of this principle can be found, but it may fairly be stated that the relationship must be at least "close and substantial". To repeat for emphasis, it is the federal power to regulate local and intrastate activities and not the regulation of interstate commerce per se that is relevant here.

The concept of cause and effect is involved. In some way, at some point, a casual relationship between the particular local activity and interstate commerce must be shown. In some statutes the relationship has been found and shown in the legislation itself, e. g., Agricultural Adjustment Act of 1938, 7 U. S. C. 1281, et seq. In others provision is made for a case by case determination that the local activity "affects commerce". National Labor Relations Act, 29 U. S. C. 151, et seq.

These two classic examples of federal control over local matters have been repeatedly pointed to by the proponents of the Civil Rights Act of 1964 as statutory precedents and presumably will be relied upon by the appellants here.

Because it is a major contention of the appellees that neither of these statutes represents a precedent for Title II of the Civil Rights Act of 1964 it is deemed appropriate, in the interest of clarifying appellees' position, to examine those statutes both in structure and effect be-

fore turning specifically to the provisions of the 1964 legislation.

2. **Neither the Agricultural Adjustment Act of 1938 Nor Wickard v. Filburn is a Precedent for Upholding Title II.**

The Agricultural Adjustment Act of 1938 represents a type of statute in which Congress legislatively finds that certain local activities, although separately perhaps having no perceptible effect on interstate commerce, in their cumulative total so affect it as to bring them within the scope of federal power.

That statute did not contemplate a determination of an effect on commerce on a case by case basis. The power of Congress under that statute to reach intrastate conduct emanated from its deliberate and specific findings that certain local activities had to be controlled to implement the over all plan of the legislation, the stabilization of the prices of various agricultural commodities. No less than eight separate and lengthy findings relating to interstate commerce and the interrelation of the markets, etc. were included in the act. 7 U. S. C. 1311, 1321, 1331, 1341, 1351, 1357, 1379(a) and 1380.

The statute, of course, was involved in **Wickard v. Filburn**, 317 U. S. 111. In that case, Mr. Filburn raised the question of whether the act could constitutionally apply to excess wheat grown on his own farm for his own consumption. This Court upheld the application to Filburn's activity even though local, on the ground that Congress had determined that such wheat, in supplying a need which would otherwise be reflected by purchases in the open market, would have a substantial economic effect on interstate commerce.

Neither the statute nor the decision provide any procedure for the judicial or administrative determination of an effect on commerce in an individual case.

Merely reading Title II of the Civil Rights Act of 1964 discloses that insofar as restaurants are concerned, no anology between the Agricultural Adjustment Act of 1938 and the Civil Rights Act of 1964 can be drawn. The pertinent portions of Title II repudiate the idea that they were conceived on any such basis. Aside from the fact that Congress made no legislative findings whatsoever, the body of the statute itself is totally incompatible with a presumed finding that racial discrimination in restaurants generally has such a cumulative effect upon commerce as to bring the regulation thereof within congressional power in the manner illustrated in **Wickard v. Filburn**, *supra*. Whether Congress could have made any such findings need not here be considered. Suffice it to say that appelleees can find nothing in the legislative history of this legislation that would have supported any such finding if such had been made. Appellants' brief will presumably urge that testimony of various kinds before congressional committees would have justified such a finding, but it will be noticed that most of this fell into two categories: that relating to the difficulty with which Negroes plan and make interstate trips and that relating to the effect on business generally of the riots of 1963. Neither type of testimony could reasonably be said to support such a finding as would be required to bring this statute within the teaching of **Wickard v. Filburn**.

More important, however, is the fact that the Civil Rights Act of 1964 does not even purport to be based upon any such finding for it rejects the concept of a cumulative effect on commerce entirely and, instead, seeks to touch only such racial exclusion in individual restaurants as is found to "affect commerce" (in a proceeding involving the individual restaurant). It is thus patterned on statutes quite different from the Agricultural Adjustment Act of 1938. If it be argued that, in the absence of specific legislative findings, this Court should look to the

enacting provisions of the statute itself to see if it may fairly be said that Congress found that segregation in restaurants generally had such a cumulative effect, the answer manifestly would be negative. Whatever its undisclosed intention in this regard might have been, Congress did not on the face of this legislation purport to apply it to **all** restaurants. No such legislative finding can, therefore, be found lurking in the statute itself.

3. The National Labor Relations Act Is Not a Statutory Precedent.

The National Labor Relations Act, enacted earlier, was conceived on a different theory. In structure and effect it differed significantly from the Agricultural Adjustment Act. If the cumulative effect concept was embedded in it anywhere, it was only to the extent that it might have influenced Congress generally to deal with the problem of labor unrest. The enacting portions of the statute were drafted to reach only those labor disputes (questions of representation or unfair labor practices) that might, either judicially or administratively, be determined, on a case by case basis, to "affect commerce".

There are many obvious reasons why Congress would use a different approach in the National Labor Relations Act, on the one hand, and in the Agricultural Adjustment Act of 1938, on the other. In the latter, it was dealing primarily with the control of commodities, most of which regularly and inevitably flowed through the channels of commerce. The act was not primarily concerned with the regulation of local activities which might or might not, in fact, have an appreciable effect upon interstate commerce. The local matters regulated were found to be inseparably related to the interstate aspects which received the primary attention of Congress. Their regulation was merely incidental to the larger problem. In the National

Labor Relations Act, on the other hand, the basic purpose of the act was to regulate relationships between employer and employees which in the overwhelming majority of cases would be purely local and only indirectly related to interstate commerce in any way.

Recognizing the inescapable fact that a labor dispute involving a particular employer might or might not have a close and substantial effect on commerce, Congress was careful to assure that it would apply only where it might be determined **on a record** that the labor dispute would actually affect commerce, i. e., in the individual case.

Section 9 (c), provided for employee elections, required the National Labor Relations Board to:

> . . . investigate such petition and if it has reasonable cause to believe that a question of a representation **affecting commerce** exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. 29 U. S. C. A. 159 (c). (Emphasis added.)

In Section 10 (a) it was provided:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) **affecting commerce**. 29 U. S. C. A. 160 (a) (Emphasis added).

In both sections it was required that there be a finding, upon a record, that the specific matter regulated in the individual case affected commerce.

The source of the federal power originated in the term "affecting commerce". It was not, however, the mere use of the term that validated the act. Rather, it was the factual determination in each individual case that commerce was indeed involved.

In discussing the term "affecting commerce", this Court in **NLRB v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, stated:

> This definition is one of **exclusion as well as inclusion.** The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, **thus qualified**, it must be construed as contemplating the exercise of control within constitutional bounds. • • • Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed. 301 U. S. at 31-32 (Emphasis added).

It appears that the constitutionality of the act was upheld by this Court because it was "thus qualified", i. e., so as to apply only to those relationships between employer and employee that, in fact, affected interstate commerce. May it not be reasonably supposed that if it had not been thus qualified, it would not have been upheld?

Significantly, in the National Labor Relations Act Congress used the full sweep of its power under the com-

merce clause. **Polish National Alliance v. N. L. R. B.**, 322 U. S. 643; **N. L. R. B. v. Fainblatt**, 306 U. S. 601.

It is clear that the proponents of the Civil Rights Act of 1964, before congressional committees and in the debates in Congress, relied primarily upon the precedent of the National Labor Relations Act and the decisions under it to sustain their contentions regarding the constitutionality of Title II. The "affects commerce" technique was employed seemingly for that specific purpose. It is appellees' contention, however, that in Title II there has been a fatal abandonment of any bona fide use of the "affecting commerce" concept as was embodied in the National Labor Relations Act and a substitution therefor of a wholly unsupported conclusive presumption that conduct affects commerce when, in fact, it may not do so at all.

Appellees do not contend that in order for a statute to be constitutional, it must be precisely patterned on an earlier statute which the courts have upheld. It is, after all, by the Constitution and not by prior legislation that congressional enactments must be measured. However, where the constitutionality of the statute in question has been the subject of nationwide discussion by both bench and bar, where it has been debated at historic length by informed and sincere members of Congress and where the proponents of the legislation have repeatedly pointed to another act and the cases under it to support constitutionality, it is believed to be entirely appropriate that the two statutes be laid side by side and examined together. If the former does not, thus compared, represent a precedent for the latter, then the arguments of the proponents are at least rendered far less persuasive. Appellees submit that neither the National Labor Relations Act nor the cases decided under it furnish any support to the constitutionality of Title II.

4. Title II Applies to Conduct Which Does Not Affect Commerce.

This brings us to an examination of Title II as it relates to this case. The pertinent portions are as follows:

> Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, * * * of any place of public accommodation, * * * without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title **if its operations affect commerce**, or if discrimination or segregation by it is supported by State action:
>
> * * * * * * * *
>
> (2) any restaurant, * * *
>
> * * * * * * * *
>
> (c) the operations of an establishment affect commerce within the meaning of this title if * * * (2) [in the case of a restaurant] it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (Emphasis added.)

First, restaurants are declared to be places of public accommodations if their operations "affect commerce".[2]

Second, the operations of a restaurant "affect commerce" if:

(a) it serves or offers to serve interstate travelers, or

(b) a substantial portion of the food which it serves has moved in commerce.

---

[2] Omitting the reference to state action with which we are not here concerned.

Although the magic words, "affect commerce" are used, they are immediately rendered nugatory by the imposition of an exclusive and inflexible presumption that commerce is affected if either of two other facts are shown. The Court below aptly referred to this as a "sophisticated" technique (R. 48). Since this device is at least novel, it is appropriate for this discussion to paraphrase Title II as it applies to appellees and to other restaurants. This was done by the Court below in the following terms: ". . . . no restaurant may refuse service to any person because of his race, color, religion or national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce." The words "affect commerce" are effectually erased.

It may be fairly observed that, unless a policy of racial exclusion in every restaurant of the United States which falls within one of these two tests would necessarily have an actual effect on interstate commerce, Congress has in this statute legislated a presumption in which there may be no connection between the fact proved and the fact inferred. See **Tot v. United States**, 319 U. S. 463, at 467-68. Whether a rebuttable presumption to that effect could be upheld is a question not presented here. In this statute it is manifestly a conclusive one. Judicial inquiry as to whether there is an actual effect upon commerce in each individual case has been legislatively foreclosed.

Unless the conclusive presumption thus legislated is valid as applied to every restaurant throughout the nation, Congress has regulated activity over which it has no authority and the statute cannot meet the constitutional test.

(a) **The Interstate Traveler Presumption Is Invalid.**

In a sense, the interstate traveler presumption is not involved in this case since the record shows that appellees

serve no transients and it is not likely that appellants will contend that it in any way applies to appellees.

The Court below, noting that no case had been called to its attention and it had found none which "held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce indicated it, like the food presumption, is invalid.

Indeed such authority as might be considered to bear upon this point supports that position. See **U. S. v. Yellow Cab Co.**, 332 U. S. 218; **Williams v. Howard Johnson's Restaurant**, 268 F. 2d 845 (4th Cir. 1959); **Elizabeth Hospital, Inc. v. Richardson**, 269 F. 2d 167 (8th Cir. 1959).

In **Boynton v. Virginia**, 364 U. S. 454, this Court stated:

> We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers. 364 U. S. at 463.

Appellees do not suggest that the above language is directly applicable to the Civil Rights Act, but merely wish to show that even under the Interstate Commerce Act it has never been held that sporadic contact with interstate passengers brings the statute into play.

A major difficulty with this test lies in the language used. It is impossible to determine to what restaurants it would apply. Since "serves" and "offers to serve" are stated in the disjunctive, one must necessarily assume that a restaurant which has never served, and prospectively would never expect to serve, an interstate traveler,

would be covered if it merely "offered" to do so. Presumably, this would apply to a restaurant located far from the paths of interstate traffic if, in making a general offer to serve the public, it was willing to serve a traveler if one should appear. Further confusing is the term "interstate traveler". Congress has not stated what it means, whether it refers to one who is in the immediate process of traveling from one state to another and who after receiving nourishment immediately resumes his journey or, perhaps, to one who, while out of his home state for several days, happens to visit a local restaurant for a meal.

Regardless of how these terms might be interpreted in a given case, it is manifest that they would apply to individual restaurants which, in fact, have no effect on commerce at all on any previously recognized theory. If this be true, the presumption, being conclusive, cannot be sustained.

(b) **The Food Presumption Is Invalid.**

We have been unable to find in the legislative history that Congress gave any consideration whatsoever to, or even had any testimony bearing upon, an effect on commerce being generated by a restaurant's serving of food which **has** moved in commerce. Although committee reports were documented with various statistics furnished by the Department of Commerce, we know of none relating to movements of food across state lines or any impact upon that movement resulting from racial segregation in restaurants. Aside from that, however, it is clear that the mere fact, standing alone, that a restaurant serves food, which at some time in the past crossed a state line, would not in every case necessarily justify the conclusion that its racial policy would have an actual effect on commerce.

The draftsmen of the Civil Rights Act seem to have been impressed by the fact that in some cases the National

Labor Relations Board has based its jurisdiction upon evidence that goods sold or consumed reach the employer from some point out of state. In such cases, the Board, admonished by Congress to find in each individual case that the specific activity affects commerce, has determined in effect that since the employer has in the past purchased out of state goods, it may be reasonably inferred that it will continue to do so in the future and, therefore, an interruption of business would have an effect upon commerce. All of the cases under the National Labor Relations Act that may be cited by appellants here, support the obvious observation that it is prospective, not past, commerce with which Congress may be constitutionally concerned. In the Civil Rights Act of 1964, the conclusive presumption legislated deals solely with food that "has" moved in commerce. A particular restaurant might well fall squarely under the terms of this statute, when, in fact, its current activities will not affect commerce at all.

While the language of the act speaks for itself, it is clear that its proponents intended to key the food test to a past movement in commerce rather than a present or future one. In testifying before the Senate Judiciary Committee Attorney General Kennedy stated that restaurants generally would be covered under the act,[3] and with respect to the food test had this to say:

> **Senator Ervin**: I will assume that the restaurant has a skillet and some pork and beans which at **some time in the past** moved in interstate commerce.
>
> I will go so far as to assume that a substantial part of his cooking apparatus and his tables and chairs and his food moved in interstate **at some time**

[3] The Attorney General testified specifically concerning the Senate bill (S1731) rather than the House bill which ultimately became the present Civil Rights Act of 1964. However, the term "has moved in [interstate] commerce" was used in both bills.

between the ratification of the Constitution and the day he is called on for the service.

With that assumption, would you answer the question?

Attorney General Kennedy: What kind of an establishment is it, Senator?

Senator Ervin: A restaurant.

Attorney General Kennedy: A restaurant that serves food would be covered. (Emphasis added.) Hearings, Senate Judiciary Committee, at 191.

The point of course is that relating coverage to cases where food has in the past moved in commerce on a conclusive presumption such as this ignores the fact that the particular restaurant may not have any further connection with out of state food whatsoever. The statute was not written so as to apply to restaurants serving food which normally and regularly moves in commerce or that may reasonably be expected to move in commerce in the future.

It must be recalled that in determining whether particular labor disputes affect commerce the National Labor Relations Board, by statute, operates under an elaborate administrative procedure. For example, under § 160 of Title 29, U. S. C., testimony at the hearing must be reduced to writing and the Board is required to make findings upon the "preponderance of the evidence". In the event of review by a Court of Appeals, the Board's findings of fact are conclusive, "if supported by substantial evidence on the record considered as a whole". Among the facts thus determined by the Board are those relating to its own jurisdiction, i. e., that the dispute affects commerce. If, therefore, the Board's findings are rejected by the Court of Appeals it must be on the ground that they were not supported by substantial evidence. If the Board finds, for example, that the unfair labor prac-

tice involved affects commerce and the Court of Appeals refuses to enforce the Board's order on jurisdictional grounds, this Court looks only to see if there is substantial evidence to support the Board's jurisdictional findings. If so, they are conclusive and the Court of Appeals is reversed.

In a typical case of this kind, **NLRB v. Reliance Fuel Oil Corp.**, 371 U. S. 224, this is exactly what happened. The evidence showed that Reliance's operation was local; that it bought fuel oil from Gulf which Reliance in turn sold locally to its customers; that Gulf was in interstate commerce and that the oil sold to Reliance was delivered to Gulf from outside the state. The Trial Examiner found an effect on commerce. The Board adopted his findings. The Court of Appeals for the Second Circuit denied enforcement on the ground that the "meager record" did not tell it enough about the volume of oil in the relevant market. The case was remanded for more evidence. The Supreme Court reversed. While the case was not treated in the opinion in terms of the substantial evidence rule, the holding was inevitably that the record showed substantial evidence to support the Board's findings and that remand was not necessary.

Notwithstanding the claims of its proponents and of appellants the Civil Rights Act of 1964 presents a radical departure from the rationale of the Labor Board cases. Merely because the Labor Board has been upheld in a particular case, in finding a substantial effect on commerce where goods have moved across state lines before reaching an employer, does not mean that there will be such an effect as a matter of law in every case. If the Board should find in a different case that although goods have moved across state lines in the past, there can be no rational inference that a labor dispute will have an effect on commerce (perhaps because of other factors making up the entire

situation), the Board would be upheld in that finding (provided, of course, that there is substantial evidence to support it). The ultimate fact to be determined is an effect on commerce. An antecedent movement of goods across state lines is merely evidentiary, i. e., it may support an inference of an effect on commerce from the current dispute.

In Title II Congress has thus legislated that which has been relied upon as evidence in some cases into a conclusive presumption in all cases. This technique may be "sophisticated" as noted by the Court below, but it is also fatal where the ultimate fact thus presumed is indispensable to the constitutionality of the attempted exercise of congressional power.

5. The Effect on Commerce Is Related to a Restaurant's Operations, Not Racial Segregation.

In Title II the "affect commerce" device is keyed to the "operations" of places of public accommodations rather than to the racial policy sought to be controlled. Apart from the objections heretofore discussed, this technique, if validated, would convert the commerce clause into a federal general welfare power under which Congress could encroach upon personal liberty and property to a degree never heretofore imagined.

This is because the statute does not require that the racial policy of the individual restaurant affect commerce (as was done with respect to labor disputes in the National Labor Relations Act). It is enough that its operations generally do so. If this is approved by this Court, then an inevitable corrolary is that Congress may regulate other phases of the restaurant's activities.

To illustrate, it is abundantly clear that the purpose of this act was to "correct injustice" or solve a problem

of "human dignity". It was not conceived as a measure to promote interstate commerce. Now whether the purposes sought were good or bad is not relevant to the issue with which we are concerned. Surely the proponents and the Congressional majority which approved the legislation were sincere and conscientious Americans whose opinions in this respect may not be disregarded. But if Congress under the pretext of exercising its commerce power can effectuate social changes by this sophisticated means, where does its power stop? If all that is necessary is to find that a restaurant's operations "affect commerce", and then the way is open to carry out any purpose thought desirable by a Congressional majority, no matter how remote from commercial affairs as normally considered, then our federal system has undergone an alarming change. If saying that a citizen's activities or business operations "affect commerce" justifies regulating him in one respect, then why not in other respects?

This result would not be restricted to restaurants. Any business could be similarly regulated. More important, individual persons are subject to the rationale. All persons' activities have some theoretical or philosophical effect on interstate commerce. Since individuals consume food, their personal activities could be regulated.

The possibilities are unlimited. Under such power, Congress could even enact legislation to encourage larger families. Certainly it would not be difficult to have someone from the Commerce Department testify before a congressional committee that there is a national interest in population growth. Common experience tells that with more people there will be more commerce. This is not intended to be frivolous. If Congress can attain its intended purpose by the means employed in this statute, radically different from those employed in any other statute governing intrastate activities, then it must, hence-

forth, be to Congressional restraint alone and not to the Constitution that Americans must look for the preservation of their personal liberty.

Those favoring the Civil Rights Act of 1964 may say that those things have not happened yet, but we recall the words of this Court in **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, that "our Constitution was designed to 'avoid these ends by avoiding these beginnings."

6. Title II Was Not Concerned With Market Impact, But With Social Problems.

Appellees recognize that in many instances Congress has exercised its power under the commerce clause to accomplish purposes not immediately related to interstate commerce such as the protection of morals, health, etc. It is not contended that it may not be motivated by such considerations. However, such a motivation may throw significant light upon the constitutionality of a statute where it is sought to be upheld on an analogy with the Agricultural Adjustment Act of 1938 and the rationale of **Wickard v. Filburn.**

Attorney General Kennedy, perhaps the principal proponent of this legislation, in testifying before the Senate Judiciary Committee, stated that he would not advocate the legislation except for "injustice" towards the Negro population, Hearings, Senate Judiciary Committee, 229.

The idea that the legislation was designed to remedy conditions leading to demonstrations and which might in turn affect commerce is repudiated by the following additional testimony of the Attorney General:

> ". . . But the reason that we need this legislation —that is what the question is, whether the legislation

> is needed—the reason it is needed is not because there are demonstrations taking place but because there are injustices that should be remedied and the legislation would take a step toward remedying those injustices." Hearings, Senate Judiciary Committee, at 110.

That the Act was not prompted by congressional interest in interstate commerce is further demonstrated by the considerable difficulty with which the advocates of the legislation agreed upon on its constitutional basis. The Attorney General preferred the commerce clause. Dean Griswold suggested the 13th Amendment. Senator Dodd favored the 14th Amendment. The constitutional basis was in fact, secondary to pressing the legislation through Congress. This is revealed by the following statement of Senator Dodd during the same hearings before the Senate Judiciary Committee:

> I do not know why we have to fuss about it. If the 14th Amendment will help, let's take it. If the commerce clause will help, let's follow it on that. If there are any other provisions of the Constitution which will help, let's have them all in. I do not see why we have any argument on it, myself. Hearings, Senate Judiciary Committee, at 162.

In view of the legislative background, it is difficult to see how it can be seriously argued that Congress was concerned with, or made implied findings with respect to, any impact on interstate markets as was done, for example, in the Agricultural Adjustment Act. Certainly no express findings were made.

7. The Decision and Opinion of the Court Below Are Correct.

Where simultaneous briefs are filed it is difficult to anticipate the argument of appellants. Recognizing this,

the Court has permitted the filing of supplemental briefs in this case following oral argument. It has been appellees' intention in this brief primarily to place before the Court its major contentions as simply and briefly as possible. Further argument may be required in a supplemental brief.

Appellants have suggested that the three-judge district court opinion was based upon a paragraph (R. 48), stating in effect that goods cease to constitute a part of interstate commerce when they are sent into a state either for the purpose of sale or in consequence of a sale and become a part of that state's property. While a reading of the entire opinion below will reveal that the district court's decision was not based upon that proposition, it is appropriate to point out, without elaborate argument here, that it is entirely adequate summation of pertinent authorities insofar as any issue in this case is concerned. The district court recognized, as do appellees, that Congress has the power to regulate local matters, wholly intrastate, which are not part of the stream of interstate commerce. Indeed this entire case must necessarily be decided in the context of that power. Where commerce proper starts and ends is not relevant here. Surely it ends somewhere. The district court stated the proposition mentioned in connection with its conclusion that it is prospective commerce to which attention may be given in regulating wholly intrastate activities (R. 44, 45).

The district court did not rely upon **The Civil Rights Cases**, 109 U. S. 3, except to observe that but for this court's opinion in **Butts v. Merchants Transportation Co.**, 230 U. S. 126, it would have more than persuasive authority. Appellees have refrained from urging the Civil Rights Cases as primary authority for their position in this case, but not because of any doubt as to the persuasiveness of Mr. Justice Bradley's observation that "no one will contend that the power to pass [the Civil Rights Act] was

contained in the Constitution before the adoption of the last three amendments [Thirteenth, Fourteenth and Fifteenth]". In the dissenting opinion in that case it was apparent that the commerce clause was in fact urged, at least with respect to one of the cases involving an interstate traveler on a railroad. The commerce clause was considered and the above language is highly persuasive.

In conclusion appellees would reiterate that they do not contend Congress does not have broad powers under the commerce clause. Admittedly it does. Nor are they unmindful of the presumption in favor of the constitutionality of a statute. On the other hand, many statutes have been declared unconstitutional by this Court. The powers of Congress under the commerce clause have not expanded. For the better part of two centuries this Court has stood as the ultimate citadel in the protection of individual liberty and private property. It is not with the slightest degree of reluctance that appellees urge this Court to hold that Title II of the Civil Rights Act of 1964 is unconstitutional both as to them and as to restaurants generally.[4]

II. Title II of the Civil Rights Act Violates the Due Process Clause of the Fifth Amendment.

It has been shown that Title II of the act, insofar as it applies to restaurants, transcends the legislative power of Congress under the commerce clause because of the means which the act employs to accomplish the purposes which it seeks—that is to say, by legislating a conclusive presumption of an effect on commerce when there may be none. Because the act upon its face thus exceeds the power—the legislative jurisdiction—of Con-

[4] Since the record shows that no "state action", as defined in Title II, influenced appellees' decision not to comply with the Act and since appellants have indicated that they will not claim this is involved in this case, this brief does not contain an argument on the 14th amendment aspect of Title II.

gress, the restrictions imposed by it upon restaurants necessarily deprive the restaurant owners of liberty and property without due process of law in contravention of the guaranties of the Fifth Amendment.

A basic impact of Title II of the act is upon the rights of private persons in the ownership, control and use of their property. It is an unavoidable fact that this legislation, to the extent which it provides, gives to the government and to other persons the right to exert control over the use of private property which otherwise would be reserved to the owner. The appellees' rights to their property and in their liberty to use it as they choose—rights which are expressly included within the due process clause of the Fifth Amendment—are diminished accordingly. These, personal liberty and private property, are rights which the Court has long deemed worthy of protection against encroachment by "the will of a legislative body without any restraint". See **Wilkinson v. Leland**, 2 Pet. 627, 657.

A person's business of course is a property right within the meaning of the due process clause. See, **e. g., Yu Cong Eng v. Trinidad**, 271 U. S. 500, 526-27; **Louis K. Liggett Co. v. Baldrige**, 278 U. S. 105, 111; **Traux v. Corrigan**, 257 U. S. 312; **Pierce v. Society of Sisters**, 268 U. S. 510; **Meyer v. Nebraska**, 262 U. S. 390, 399. **Cf. Greene v. McElroy**, 360 U. S. 474. And as observed by Mr. Justice Day in **Buchanan v. Warley**, 245 U. S. 60, 74, in reference to the scope of the protection of the Fourteenth Amendment, "Property is more than a mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it."

It long has been assumed that a businessman, as an incident of the right to use and control his property as he wishes, may deal or refuse to deal with whomever he pleases. Whether this incident of property ownership

is characterized as a property right or a liberty would not seem material. Thus, in the words of Mr. Justice Holmes in **Terminal Taxicab Co. v. Kutz**, 241 U. S. 252, 256, "an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes." It similarly has been remarked that it is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.**, 227 Fed. 46, 48 (C. A. 2). Indeed, even the federal government, "like private individuals and businesses," enjoys the "unrestricted power" to determine those with whom it will deal. **Perkins v. Lukens Steel Co.**, 310 U. S. 113, 127.

Accordingly, the freedom of a business enterprise to select its patrons and customers is deemed a "liberty" within the protection of the due process guarantee. See, **e. g., Pierce v. Society of Sisters**, 268 U. S. 510, 525. Similarly, it has been considered that the liberty thus protected by the due process clause includes the freedom of the individual to be arbitrary in this right to select his customers. In the words of Mr. Justice Harlan in **Peterson v. Greenville**, 373 U. S. 244, 250 (concurring opinion):

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: Liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of freedom from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the amendment were applied to governmental and private action without distinction.

See, also, **Browder v. Gayle**, 142 F. Supp. 707, 715 (M. D. Ala.) (per Rives, J.) *aff'd per curiam* 352 U. S. 903 **Cf.** Charles A. Reich, "The New Property", 73 Yale Law Journal 733, 771 (1964).

The impact of the restraints imposed by Title II of the act upon these rights of appellees in the ownership and operation of that business is clear. The evidence in the district court was that in view of the location of appellees' restaurant and other factors, service of Negroes in accordance with the requirements of the act would damage the business "75 or 80 percent", thereby destroying its profitability (R. 78-79). The act's effect upon their liberty to serve or not serve whomever they choose is self-evident.

Even in a highly commercial context, a businessman has always possessed the right to deal with those he pleases, and for reasons personal to himself this right to exclude certain persons might and often does have real meaning to him. Thus appellees, in accordance with their personal convictions, have consistently refused to serve "a drunken man or a profane man" (R. 79). That the conviction of one may seem wrong in the eyes of others is immaterial; it is nonetheless a right of the one. Moreover, not dissimilar personal rights of persons in their personal convictions and in their choice of associates have been recognized and accorded constitutional protection by this Court. See, *e. g.*, **West Virginia State Board of Education v. Barnette**, 319 U. S. 624; **Bates v. Little Rock**, 361 U. S. 516; **International Ass'n of Machinists v. Street**, 367 U. S. 740; **Gibson v. Florida Legislative Committee**, 372 U. S. 539.

In sum, it seems plain that Title II of the act imposes upon restaurants within its coverage restraints on established rights of liberty and property which are entitled to constitutional protection.

These rights, as any others, of course, are not absolute and may be limited by legitimate governmental regulation, for as Mr. Justice Day remarked in **Buchanan v. Warley**, 245 U. S. 60, 74: "Property consists of the free use, enjoyment and disposal of a person's acquisition without control or diminution save by the law of the land." But it is axiomatic that the government's power to regulate is also not without its limits. Congress' commerce power, like its others, is subject to the restraints of the due process clause of the Fifth Amendment, **Currin v. Wallace**, 306 U. S. 1. Since it has exceeded its power in the enactment of Title II, the restraint imposed by it upon appellees' business deprives them of their rights of liberty and property without due process of law. For, as Mr. Justice Black said in **Bell v. Maryland**, ... U. S. ..., 12 L. Ed. 2d 822, 858 (dissenting opinion):

> [W]hen one party is unwilling, as when the property owner chooses not to sell to a particular person or not to admit that person, then . . . he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.

While it is possible that restaurants and cafes might be subject to some governmental regulation, they are subject only to such regulation as is within the scope of the power under which it is asserted. Only to this extent is there any permissible area of restraint on the rights of liberty and property protected by the Fifth Amendment. Accordingly, Title II insofar as it applies to appellees and restaurants generally imposes limitations that are unconstitutional.

Whether or not a particular business is one "affected with a public interest" or subject to a similar charac-

terization as the common law duty of innkeepers is irrelevant. The power of Congress to legislate the restrictions contained in Title II, insofar as pertinent here, is derived solely from the commerce clause. Its exercise in this instance purports to be based only upon the commerce clause. If the power of Congress under that clause is insufficient to accomplish what it has sought to do, there plainly is no other source upon which it can rely. For, if the doctrine of "businesses affected with a public interest" has any present vitality, it would, as to federal legislation, be applicable only to those objects of regulation which are in the first instance within the legislative powers of Congress conferred by the Constitution. But even as to state legislation the now discarded characterization of a business affected with a public interest has served only as a shorthand expression for the conclusion that a state's regulation was reasonable and within its power. And if a state had no legislative jurisdiction to exercise its police power, the doctrine of businesses affected with a public interest likewise would not extend that power. Furthermore, it has uniformly been declared that that doctrine has no application whatever to cafes, restaurants and similar establishments engaged only in the sale of food, and that restaurants, therefore, are free to exclude and deny service to anyone on whatever ground they wish. *E. g.*, **Williams v. Howard Johnson's Restaurant**, 268 F. 2d 845, 847 (C. A. 4); **Nance v. Mayflower Tavern**, 106 Utah 517, 150 P. 2d 773, 776 (Utah). **Cf. Garifine v. Monmouth Jockey Club**, 29 N. J. 47, 148 A. 2d 1.

For like reasons, decisions involving the constitutionality under the Fourteenth Amendment of anti-discrimination legislation enacted by states under the police power offer no support for appellants. This of course is because the power of a state under its police power to legislate in restraint of the rights of restaurant owners has, within the bounds of that state, no limits of territorial jurisdiction. Thus, it does not do to say that the authority of the

federal government over interstate commerce does not differ in extent of character from that retained by the states over intrastate commerce, since that assumes the answer to the critical question, that is, whether the scope of Title II and its regulation of these particular activities of local restaurants on the basis of goods which have moved at some time from out of state is a regulation of commerce at all. Consequently, any determination of questions of due process which may be involved with respect to similar state legislation affecting restaurants—a question which to our knowledge has not been decided by this Court—is entirely irrelevant to the issues here.

III. The District Court Properly Exercised Its Equity Jurisdiction.

In its application to appellees Title II of the act prescribes an affirmative duty in its command that they, as the owners and operators of a restaurant within the act's coverage, afford to all persons the equal enjoyment of the goods, services, and facilities offered in their restaurant. The refusal to comply with this duty is made unlawful, and the act authorizes actions to compel by injunction the performance of its requirements to be brought by private persons (§ 204(a)) and the Attorney General (§206(a)). Consistently since the law's enactment appellees have violated the act's prohibitions. On several occasions before commencement of this action groups of Negroes had entered their restaurant and requested service in accordance with the act's requirements, which appellees declined to provide. Only two days prior to the filing of this suit, a proceeding to enforce Title II was instituted by the Attorney General against some fifteen restaurant proprietors. The Attorney General certainly has at all times indicated a firm intention to enforce strenuously the provisions of Title II against all persons not in compliance. Only the actual institution by the Attorney General could have

made the controversy any more concrete than it was at the time the present suit was filed. It is true that appellants say that enforcement proceedings against appellees were not then contemplated, but private persons who were capable of enforcing the act had investigated appellees' policy of compliance. We are aware of no decision of this Court which has held under like circumstances that a "case or controversy" did not exist. Compare **United Public Workers v. Mitchell**, 330 U. S. 75, and **Poe v. Ullman**, 367 U. S. 497, with **Adler v. Board of Education**, 342 U. S. 485, and **Railway Mail Ass'n v. Corsi**, 326 U. S. 88.

In **Adler v. Board of Education**, *supra*, where teachers sought a declaration of the unconstitutionality of the Feinberg Law providing for the establishment of lists of subservise organizations and the disqualification of teachers who were members of such listed organizations, the Board when the suit was filed had announced only that it intended to publish the lists, but had not yet done so and plainly had not begun to enforce the law.

And where, as here, the issue is whether the plaintiff has the constitutional right to be free of the restraints imposed by a statute which has a present impact upon the right asserted by the plaintiff, it has been held that there was an actual controversy. **Public Utilities Comm'n of California v. United States**, 355 U. S. 534; **Currin v. Wallace**, 306 U. S. 1; **Carter v. Carter Coal Co.**, 398 U. S. 238; **Pierce v. Society of Sisters**, 268 U. S. 510; **Pennsylvania v. West Virginia**, 262 U. S. 553.

Thus, in **Public Utilities Comm'n of California v. United States**, *supra*, in which the United States sought to determine the constitutionality of a state statute prohibiting carriers from negotiating certain contracts with the government without the state commission's approval, the commission contended there was no justiciable controversy since there was no allegation that the commission had

done or threatened to do anything adverse to the government. Since the commission had indicated an intent to enforce the act and because the issue was whether the United States had the right to be free of the state control, a justiciable controversy was present.

The insistence of appellants that the Court below was without equity jurisdiction likewise is without merit. Their position, as we understand it, is that appellees have an adequate remedy at law in that they would be able to assert the act's unconstitutionality in defense of an enforcement suit provided by the act. Yet, in any number of cases federal courts have assumed jurisdiction to restrain the enforcement of laws despite a similar availability of an "adequate remedy" in the event of prosecution. For, "the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity." **Walla Walla v. Walla Walla Water Co.**, 172 U. S. 1, 12.

This action involves a federal statute under which the federal district courts are granted exclusive jurisdiction of proceedings brought to enforce its provisions. If an enforcement proceeding were instituted against appellees, the suit would have been before the very court in which the present action was filed. With respect to the propriety of the exercise of equity jurisdiction, therefore, the posture of this case is vastly different from suits in federal courts to enjoin the enforcement of state criminal or civil statutes. There is involved no policy relating to the independence of courts in the dual system of our government which underlies the reluctance of federal courts to grant anticipatory relief from threatened state action except in the gravest of circumstances, as exemplified in such cases as **Douglas v. Jeannette**, 319 U. S. 157; **Spielman Motor Co. v. Dodge**, 295 U. S. 89; **Hygrade Provision**

Co. v. Sherman, 266 U. S. 497; **Watson v. Bush**, 313 U. S. 387; and **Beal v. Missouri Pacific R. R.**, 312 U. S. 45. As stated by Mr. Justice Stone in **Beal v. Missouri Pacific R. R.**, *supra*, a suit to enjoin enforcement of a state statute:

> This [the reluctance to restrain criminal prosecutions] is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. [Citations omitted.] The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. [Citations omitted.] Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary in order to prevent irreparable injury. [Citations omitted.] And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. [Citations omitted.]

Obviously those considerations are not involved here, for if an enforcement action were brought the same district court would have determined the constitutional issues

presented. Compare **Wickard v. Filburn**, 317 U. S. 111, involving a federal statute, in which equity jurisdiction was exercised although the only apparent injury to the plaintiff would have been the collection of a penalty amounting to $117.11.

Nevertheless, the circumstances of this case are similar to those in which the grant of equitable relief to restrain threatened enforcement of **state** laws has been upheld. The basis of this action and the relief sought is that Title II of the act in its application to appellees' business and restaurants generally is unconstitutional. The act imposes upon their business a presently operative duty which is a restraint upon their business. Compliance with or enforcement of its requirements of course would seriously injure and probably destroy the business (R. 78-79). But beyond that, the existence and general enforcement of the act in itself would have an injurious effect upon the business by effectively encouraging Negroes to seek service in increasing numbers, which would adversely affect the continued patronage of appellees' predominantly family-group clientele, particularly if, as is quite possible, the refusal to serve them caused disturbances. Moreover, the enforcement procedures provided by the act are not as adequate as the remedy under 28 U. S. C., § 2282. Appellees testified that the filing by the Attorney General of an enforcement suit against Tuscaloosa restaurants two days before commencement of this suit was the chief reason this action was brought. This was "because I felt like if I were grouped with Howard Johnsons and Holiday Inn and other restaurants of that nature that I would have no opportunity at all to present my case as a local restaurant" (R. 90). In the Tuscaloosa suit brought under Section 206 against persons believed to be engaged in a pattern of resistance to the act, the Attorney General had included in a single complaint some fifteen restaurants of varying types. It

would indeed have been difficult, if not impossible, for appellees to adequately present their case in such a suit. In any event in a case such as this, where the gravamen of the suit is that the existence and maintenance of the challenged law constitutes a present invasion of the plaintiff's property rights, "the equitable jurisdiction is clear." **Euclid v. Ambler Realty Co.**, 272 U. S. 365, 386; **Pennsylvania v. West Virginia**, 262 U. S. 553; **Carter v. Carter Coal Co.**, 298 U. S. 238; **Pierce v. Society of Sisters**, 268 U. S. 510. See, also, **Cincinnati v. Cincinnati & Hamilton Traction Co.**, 245 U. S. 446. Thus, in **Pierce v. Society of Sisters**, *supra*, injunctions were held to be properly granted against legislation unlawfully interfering with the plaintiffs' selection of business patronage. **Cincinnati v. Cincinnati & Hamilton Traction Co.**, 245 U. S. 446, was a suit in Federal Court to enjoin on constitutional grounds the enforcement of an ordinance regulating plaintiff's street-car company. Much like the enforcement provisions of Title II, the ordinance provided further that if the company refused to comply, the city solicitor could institute proceedings to enforce its provisions. No penalties were imposed for failure to comply. The city questioned the Court's jurisdiction because enforcement of the ordinance could only be had through institution of a suit, until which time noncompliance would cause the company no injury. The company maintained the ordinance had a present effect. The Court, per Mr. Justice McReynolds, held that the equity jurisdiction was properly invoked.

The absence of criminal penalties under the act does not deprive the Court of equity jurisdiction, as is shown by **Cincinnati v. Cincinnati & Hamilton Traction Co.**, *supra*. This is all the more true when, as here, the statute confers upon members of the public individual rights of action against the party violating it, with the resultant possibility of a multiplicity of suits. See **Cleveland v.**

Cleveland City Ry. Co., 194 U. S. 517, 531, and **Detroit v. Detroit Citizens Street Ry. Co.**, 184 U. S. 368, 378-81.

It is submitted, in sum, that in the circumstances of this case the equity jurisdiction of the district court was properly invoked.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

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Supreme Court of the United States

October Term, 1964

No. 543

Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America; Macon L. Weaver, as United States Attorney for the Northern District of Alabama,

Appellants,

v.

Ollie McClung, Sr., and Ollie McClung, Jr.

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA

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INDEX

Opinion Below 1

Interest of the State of North Carolina 1

Statement of the Case 2

Question Presented 2

Summary of Argument 2

Civil Rights Act of 1964 3

Constitutional Provisions 4

Argument 5

Constitutional Provisions and Statutes 4

Article I, Section 8, of the Constitution of the United States 4

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OPINION BELOW

The Opinion of the Three-Judge Federal Court in this case was issued in Civil Action No. 64-448 and is dated September 17, 1964, instituted in the United States District Court for the Northern District of Alabama, Southern Division. The Opinion is not yet officially reported.

INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina is interested in knowing to what limits the Commerce Clause (Article I, Section 8, Constitution of the United States) may be extended and whether

or not this Clause can be used to regulate social relationships and every activity of the lives of its citizens.

STATEMENT OF THE CASE

Plaintiffs operate as a partnership and have a restaurant in Birmingham. It has been operated by the plaintiffs' family at this location since 1927. The chief business of plaintiffs is serving barbecued meats, homemade pies and nonalcoholic beverages. The business is eleven blocks from the nearest interstate highway and a greater distance from the nearest railroad station and bus station, and, likewise, the business is between six and eight miles from the nearest airport. Plaintiffs purchase their food locally from a meat-packing company and from this company's Birmingham branch. The meat purchased from the Birmingham branch is shipped in from outside the State of Alabama. Plaintiffs have not complied with the Civil Rights Act of 1964, and would lose a substantial amount of business if forced to serve Negroes. From its beginning plaintiffs have only served white customers. The Court below concluded as a matter of law that a substantial portion of the food served by plaintiffs has moved in commerce within the meaning of the Act.

QUESTION PRESENTED

Are the provisions of Title II of Public Law 88-352, 78 Stat. 241, relating to discrimination in places of public accommodation, valid and constitutional under the provisions of the Commerce Clause of the Constitution of the United States (Article I, Section 8)?

SUMMARY OF ARGUMENT

Apparently this case was tried upon the theory that there was no application of the Fourteenth Amendment since the Three-Judge Court states in its opinion that it was conceded at oral argument "that the State of Alabama, in none of its manifestations, has been involved in the private conduct of

plaintiffs in refusing to serve food to Negroes for consumption on the premises."

The State of North Carolina will argue that in the regulation of commerce among the states there was never intended to join to or relate to such regulation any and all collateral incidents and activities that may take place among the residents of a state or any other persons who may happen to be within its borders. The State of North Carolina will further argue that somewhere the stream or flow of interstate commerce must cease; that the commodities or products brought into a state must somewhere and at some time become a part of the products and property of the state and that interstate commerce does not go on forever and attach itself to all functions and activities that take place within a state and thereby subject to congressional regulation and control of Congress every aspect of social and commercial life within a state. The State of North Carolina will argue that however desirable the social objectives to be achieved regulation under the Commerce Clause cannot be the constitutional basis of every form of equality that minority groups may think desirable nor was the Commerce Clause designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination. The State of North Carolina will further argue that in the case before the Court all functions of interstate commerce have ceased when the products are delivered to the wholesale distributor and certainly when the products are delivered to the establishment that completely changes the form and qualities of the food for service to customers.

CIVIL RIGHTS ACT OF 1964

The pertinent portions of the Civil Rights Act of 1964, as applicable to this case, are quoted by the Three-Judge Federal Court as follows:

> "Section 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, fa-

cilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . .

. . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

. . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if . . . . (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce . . . . ."

CONSTITUTIONAL PROVISIONS

Article I, Section 8, of the Constitution of the United States, with reference to Commerce, provides as follows:

"The Congress shall have power * * *

"to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

"And to make all laws which shall be necessary and

proper for carrying into Execution the foregoing Powers * * *."

ARGUMENT

The Court is now asked to expand the concept of the regulation of commerce among the states far beyond any point or limit as explained and developed in all previous decisions of this Court. This the Court is asked to do not because of any pressing need which has been pointed up for the regulation of commerce and its free flow or because of any acts that burden interstate commerce or because of any internal conditions in the State that develop into obstructions to interstate commerce but rather because a predesigned social objective is sought and those seeking to establish this leveling process look everywhere in the Constitution to find some basis for their preconstructed theory.

As pointed out in the Opinion of the Court there has always been some substantial relationship to the movements of commerce between the states or some intrastate activities which potentially and naturally develop into obstructions which burden or hinder the freedom of the flow of commerce among the states. The bases of these decisions have always been tied to articles or material things which move in commerce or the preparation of which articles and things are designed to move in commerce. Sometimes the economic competitive conditions in the several states have been deciding factors. The Court Below points out examples such as the Robinson-Patman Act, the Federal Food, Drug and Cosmetic Act, the White Slave Laws, Gambling Devices Transportation Act, the Agricultural Adjustment Act of 1938, the Fair Labor Standards Act, and the National Labor Relations Act. It will be seen that however indirect all of the subjects covered by these Acts relate to transportation and commerce, and it is not denied that the means utilized by Congress to carry out its regulations may have the characteristics of police regulations.

The above portions of the Civil Rights Act of 1964, dis-

regard all previous concepts as to when commerce ends and comes to rest at its destination in a state. We have previously thought that when articles carried in commerce arrive at their destination in a state where they are held for final disposal or use the articles became a part of the mass of property in the state and commerce ended, and this was especially true when the articles passed to the buyer to be used by him in intrastate trade. Certainly this has previously been true when the articles or goods reached the point where the parties originally intended that the movement in commerce should finally end. The preparation and serving of food could not possibly burden or obstruct interstate commerce and whatever words are used, either "direct", "indirect", "substantial" or "material", could possibly bring into focus a situation that affects commerce in the sense of these words by the service of prepared food as shown in this case. However, the statute now under scrutiny by its own words and in conclusive manner produces a situation where the fact that food has moved in commerce at all affects commerce. If this is true, then the current and flow of commerce among the states never ceases and Congress will, therefore, have the power to regulate and control every facet and detail of the lives and activities of the citizens who live in a state. We wear clothing that has moved in interstate commerce, we live in houses of which the materials of construction moved in interstate commerce, the lawyer's books and office equipment moved in interstate commerce, and the books and office equipment and facilities of the dentist and physician moved in interstate commerce. If the logic contained in this statute is true, then there is no reason why Congress should not or could not regulate the laws of homicide because the weapons or instruments of death had previously moved in commerce among the states. Of course, these situations are not named in the statute under consideration but the limits of the logic of the statute would contemplate all these things. The Court may be sure that if this situation is held to be subject to the regulation of Congress under the Commerce Clause, then the pressure to push the controls into other fields will be unending.

We will not discuss the many cases on the subject or

attempt to distinguish the words and phrases used in various decisions since this will be done in the briefs of the parties. It is our view that the decision made in this case places the Court at a constitutional cross-roads for it must decide whether or not a dual system of government, operated by a central government and by a local government of states, shall continue to exist. Unless some limitation is placed on the powers that can be exerted by Congress under the Commerce Clause, then the most powerful constitutional forces to abolish all state functions and powers will have been created. The potential powers that lurk in the Commerce Clause and its judicial expansion are far greater than those given to the Federal Government by the Fourteenth Amendment and other provisions of the so-called Bill of Rights.

There exists in this Nation today a Marxist group known as The Socialist Labor Party of America. The ideology is the same as that of the Communist Party except for the fact that the Socialist Labor Party of America does not believe in trying to overthrow the present government of this Nation by force and violence. This Marxist group believes that there lurks in the Constitution of this Nation sufficient powers to abolish all individualism and private property without resorting to revolution by force of arms. The Party was organized in 1890, and one of its great theoreticians was a man by the name of Daniel DeLeon. On August 23, 1913, DeLeon made some prophecies about the Commerce Clause of the Constitution and the Weekly People, the official organ of the Party, in its issue of Saturday, August 17, 1963, wrote an editorial on DeLeon's prophecy, which was entitled "Implications of the Commerce Clause." After reviewing the powers that had been exerted under the Commerce Clause the editorial said:

> "The important thing is that the Administration proceeded to use its most powerful constitutional instrument.
>
> "The Commerce Clause (Article I, Section 8) reads: 'The Congress shall have power * * * to regulate com-

merce * * * among the several states.' Implicit in these words is a principle that foreshadows the Socialist Industrial Republic, for it asserts the power of the Nation over the economy. Justice Oliver Wendell Holmes has pointed out that the Commerce Clause is a recognized vehicle of national policy of all sorts. But it was Daniel DeLeon, foremost Marxist and eminent authority on constitutional law, who perceived in this Clause a projection of the Socialist Republic. Thus, in an editorial captioned 'The Amendments Flood', Daily People, August 23, 1913, DeLeon wrote:

"'The constitutional provision that empowers Congress to regulate commerce is the leading germ of the Socialist Republic embodied in the Constitution. The Clause was an unconscious projection far ahead of the time of its enactment. It projected the day when the political State shall have ceased to be, and the chick which the political State hatched, the Industrial State (by which DeLeon, of course, meant the nonpolitical socialist commonwealth), will have supplanted it.'

"When the social revolution shall have been accomplished the Commerce Clause, now in the Constitution, will stand out as the grain of gold freed from the mass of the other clauses which are but the bourgeois alloy that the grain of gold is now amalgamated with. Until then there will be amendments galore. While seemingly, and supposed to be, revolutionary, these are basically reactionary, in that one and all tend to becloud the really revolutionary germ of the Constitution.

"There will be One amendment that will be an Amendment—it will be an amendment in the nature of a substituted motion—it will be the amendment enforced by the industrially organized useful occupations of the land—an amendment that will annul all the clauses of the Constitution but one, the Commerce Clause, and

will be the highest exposition, verifier and enforcer of the Clause."

Thus we have seen the prophecy and socialist vision made by the Marxist DeLeon in 1913 come to fruition and maturity by the Civil Rights Act of 1964.

Respectfully submitted,

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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INDEX

PAGE

ARGUMENT 1

Introduction 1

I. Appellees' Restaurant Is a Place of Public Accommodation Within the Meaning of Section 201 of the Civil Rights Act of 1964 Reasonably Construed With Appropriate Regard for the Purposes and Constitutional Power of Congress 4

A. Ollie's Barbecue Offers to Serve Interstate Travelers Within the Meaning of §201(c)(2) 6

B. There Is No Proof That Ollie's Barbecue Does Not Actually "Serve . . . Interstate Travelers"; the Record Tends to Show the Contrary 12

C. A Substantial Portion of the Food Served by Ollie's Barbecue Has Moved in Commerce Within the Meaning of Section 201(c)(2) 14

D. As There Was No Evidence Upon Which It Might Be Decided Whether Discrimination at Appellees' Business Was Supported by State Action Within the Meaning of §201(d), the Appellee Had No Standing to Obtain, and the Trial Court No Equity Jurisdiction to Grant, an Injunction Embracing This Provision 15

E. The Suggested Interpretation Indicated in This Brief Would Enable the Various Parts of the Law to Function in a Complementary Manner to Effectuate the Congressional Purpose 16

PAGE

II. The Power of Congress to Regulate Commerce Among the States Supports Title II of the Civil Rights Act 19

III. Title II Does Not Offend Any Other Constitutional Provisions 26

A. A Requirement That Restaurateurs Open to the Public Provide Service Without Racial Discrimination Does Not Violate the Fifth Amendment Due Process Clause 26

B. The Thirteenth Amendment Is No Bar to the Act 27

C. The Tenth Amendment Does Not Invalidate Title II 28

TABLE OF CASES

Cases:

American Communications Assn. v. Douds, 339 U. S. 382 22
Arver v. United States, 245 U. S. 366 28

Bailey v. Patterson, 368 U. S. 346 16
Baldwin v. Morgan, 287 F. 2d 750 (5th Cir. 1961) 17
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 27
Boynton v. Virginia, 364 U. S. 454 ..... 11, 23, 27
Brown Holding Co. v. Feldman, 256 U. S. 170 28
Brown v. Maryland, 25 U. S. (12 Wheat.) 419 28
Burton v. Wilmington Parking Authority, 365 U. S. 715 27

Caminetti v. United States, 242 U. S. 470 24
Champion v. Ames, 188 U. S. 321 23
Civil Rights Cases, 109 U. S. 3 ..... 16, 27
Colorado Anti-Discrimination Com. v. Continental Air Lines, 372 U. S. 714 27

PAGE

District of Columbia v. John R. Thompson Co., 346 U. S. 100 27

Edwards v. California, 314 U. S. 160 22

Georgia v. United States, 201 F. Supp. 813 (N. D. Ga. 1961), aff'd 371 U. S. 9 17
Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1 ....2, 19, 20, 21, 28
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 22
Gober v. Birmingham, 373 U. S. 374 .....15, 16

Hammer v. Dagenhart, 247 U. S. 251 23
Heart of Atlanta Motel, Inc. v. United States, No. 515, Oct. Term, 1964 25
Henderson v. United States, 339 U. S. 816 27
Hoke v. United States, 227 U. S. 308 24

Lombard v. Louisiana, 373 U. S. 267 .....15, 16

McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316 .....2, 28
McDermott v. Wisconsin, 228 U. S. 15 24
Mitchell v. United States, 313 U. S. 80 27
Morgan v. Virginia, 328 U. S. 373 23

N. L. R. B. v. Fainblatt, 306 U. S. 601 .....22, 25
N. L. R. B. v. Jones & Laughlin Steel Co., 301 U. S. 1 24, 26
N. L. R. B. v. Reliance Fuel Corp., 371 U. S. 234 .....2, 22

Peterson v. Greenville, 373 U. S. 244 27

Railway Mail Assoc. v. Corsi, 326 U. S. 88 27
Robinson v. Florida, 378 U. S. 153 .....15, 16

Slaughterhouse Cases, 83 U. S. (18 Wall.) 36 28
Swift & Co. v. United States, 196 U. S. 375 3

PAGE

Turner v. Memphis, 369 U. S. 350 ..... 3, 27

United States v. Carolene Products, 304 U. S. 144 20
United States v. Darby, 312 U. S. 100 ..... 21, 22, 23, 24, 26, 28
United States v. E. C. Knight Co., 156 U. S. 1 3
United States v. Employing Plasterers Assn., 347 U. S. 186 25
United States v. Ferger, 250 U. S. 199 22
United States v. Rock Royal Co-Operative, 307 U. S. 533 24
United States v. Sullivan, 332 U. S. 689 ..... 24, 25
United States v. Women's Sportswear Mfg. Assn., 336 U. S. 460 25

Wickard v. Filburn, 317 U. S. 111 22
Willis v. Pickrick, —— F. Supp. —— (N. D. Ga., No. 9028; September 4, 1964) 3

Other Authorities:

Hearings Before Joint Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 4, pt. 1 (1963) 7-8, 18

Minority Report, H. R. Rep. No. 914, 88th Cong., 1st Sess. 79 (1963) 8

110 Cong. Rec. 1456 (Daily Ed., Jan. 31, 1964) 9

110 Cong. Rec. 1901 (Daily Ed., Feb. 5, 1964) 9

110 Cong. Rec. 7177 (Daily Ed., Apr. 9, 1964) 11

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ARGUMENT

Introduction

Proponents and opponents alike agree that the Civil Rights Act of 1964 is one of the most significant legislative enactments in our history. Both Houses of Congress subjected it to lengthy and exhaustive hearings, debate, and controversy, and finally passed it by large majorities. Much of the lengthy consideration and debate focused on the part of the Act involved in this case, Title II providing for "Injunctive Relief Against Discrimination in Places of Public Accommodation." We think it appropriate to say of this law, as Chief Justice Marshall said of the bill incorporating the bank of the United States, that it:

> . . . did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, . . . in the fair and open field of debate . . . with as much persevering talents as any measure has ever experienced, and being supported by arguments which convinced minds as pure and intelligent as this country can boast, it became a law. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.[1]

Yet, appellees, with extraordinary intrepidity, have summoned arguments rejected by Congress and have persuaded a Court of the United States that the public accommodations law is an exercise of "naked power" by the Congress unsanctioned by the Constitution.

The importance of such a case is manifest. The desirability of promptly determining this issue has been recognized. We submit below that Congressional power to enact this law under the power to "regulate Commerce . . . among the several States" can be sustained by settled and conventional constitutional doctrine reflected in decisions as old as *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, and as recent as *N. L. R. B.* v. *Reliance Fuel Corp.*, 371 U. S. 234. Indeed, in light of the precedents, the commerce issue cannot be regarded as difficult or close.

We shall also discuss a more subtle danger lurking behind appellees' frontal, and perhaps premature,[2] attack on the

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[1] *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 401.

[2] We recognize that the issues of justiciability and equity jurisdiction raised by the United States involve substantial questions which may well necessitate reversal of the judgment below independent of the constitutional and statutory issues. Because of time

Civil Rights Act. This danger is that the force and effectiveness of the Act may be weakened, even temporarily, by a restrictive construction.[3] Compare the "Sugar Trust Case," *United States* v. *E. C. Knight Co.*, 156 U. S. 1, with *Swift & Co.* v. *United States*, 196 U. S. 375. Even an inadvertent or implied restriction on the coverage of the Act could cripple it immeasurably, by undermining the pattern of voluntary compliance which has emerged in many localities as well as by its effect on enforcement proceedings in lower courts. This danger is acute here because neither the United States nor any person aggrieved by discrimination has made an effort to present facts establishing that appellees' restaurant is covered by the Civil Rights Act.[4] The only evidence of coverage was presented by the appellees themselves, and they naturally had no interest in developing any facts pertaining to coverage which would undercut their constitutional theories. Despite this, it does

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limitations this brief is limited to a discussion of the paramount issues of constitutionality and interpretation.

There is a substantial public interest in prompt resolution of the issues of constitutionality, and since the Act is clearly valid under settled principles, there is no compelling reason for postponing decision. Cf. *Turner* v. *Memphis*, 369 U. S. 350. Further guidance to the lower courts on questions of interpretation of the Act—again where the congressional purpose is manifest—is also plainly desirable and appropriate notwithstanding the procedural difficulties in this case. Rules of self-restraint applicable to decisions of constitutional issues do not apply with equal force to statutory interpretation, because Congress can rectify any error of interpretation.

[3] Already some judges have construed the Act so restrictively as to remove most restaurants from coverage. See the special concurring opinion of Circuit Judge Bell with Judge Hooper in *Willis* v. *Pickrick*, —— F. Supp. —— (N. D. Ga., No. 9028; September 4, 1964); earlier proceedings reported at 231 F. Supp. 396.

[4] Consistent with its view that there was no equity jurisdiction and no justiciable controversy, the United States made no investigation of this restaurant, and presented no witnesses or exhibits.

plainly appear from the record that "Ollie's Barbecue" is a "place of public accommodation" as defined in Section 201 of the Act. The case properly presents an occasion for application and interpretation of the Act.

I.

Appellees' Restaurant Is a Place of Public Accommodation Within the Meaning of Section 201 of the Civil Rights Act of 1964 Reasonably Construed With Appropriate Regard for the Purposes and Constitutional Power of Congress.

All parties agree, and the evidence is conclusive, that Ollie's Barbecue is a "restaurant . . . principally engaged in selling food for consumption on the premises," and is one of the types of facilities mentioned in Section 201(b)(2) of the Act. Equally undisputed, this restaurant "serves the public" (§201(b)). No one contends that the restaurant is excepted from the Act as a "bona fide private club or other establishment not open to the public" (§201(e)). There is clear proof that appellees deny to Negroes (including customers, potential customers and employees) "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" of the establishment by discrimination and segregation on the ground of race and color.[5]

---

[5] Both appellees testified to their policy of refusing Negroes food service except at a take-out counter for Negroes (Tr. 34, 60, et seq.). They mentioned several occasions when Negroes had been denied table or counter service on racial grounds (Tr. 43, 60). Ollie McClung, Sr. acknowledged that Negro employees were segregated from white employees when eating on the premises (Tr. 57). (The reference in §201(a) to "all persons" is surely broad enough to cover employees as well as customers.)

A restaurant is a place of public accommodation covered by the Act "if its operations affect commerce, or if discrimination or segregation by it is supported by State action" (§201(b)). In Section 201(c)(2) the Act provides that the operations of a restaurant "affect commerce within the meaning of this title" if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce." Section 201(d) provides criteria for determining whether discrimination or segregation by an establishment is "supported by State action within the meaning of this title."

Appellees argued below that their restaurant *was* covered, but only by virtue of §201(c)(2) relating to the movement in commerce of food served. The District Court agreed, stating that the issues "require our consideration of only that portion of the statute relating to restaurants which serve food, 'a substantial portion' of which 'has moved in commerce.'" The court held that provision unconstitutional. Also, the Court undertook to cast doubt upon the validity of the alternative criterion in §201(c)(2) providing coverage of a restaurant if "it serves or offers to serve interstate travelers," by observing:

> No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir. 1959); Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959); United States v. Yellow Cab Co., 332 U. S. 218 (1947).

Whatever the limitations of its opinion, the order of the District Court enjoined the Attorney General from enforcing Title II, *as a whole*, against appellees. It is submitted below that Ollie's Barbecue is a place of public accommodation within the Act in that it "offers to serve interstate travelers." Next, it will be demonstrated that appellees failed to establish that they did not actually "serve . . . interstate travelers" and that the most logical inference from the record is that they do and are covered by this criterion as well. Further, it will be urged that the evidence concerning this restaurant establishes that "a substantial portion of the food which it serves . . . has moved in commerce." Finally, it will be submitted that insofar as there was no substantial evidence from which absence of state support for segregation as defined by subsection 201(d) can be ascertained, there was no occasion for a ruling on the validity or applicability of this subsection, and no justification for the broad injunction.

A. *Ollie's Barbecue Offers to Serve Interstate Travelers Within the Meaning of §201(c)(2).*

The evidence relevant to the "offer to serve" criterion may be summarized briefly. The trial court found that:

> 5. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad and bus station and between six and eight miles from the nearest airport.
>
> 6. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

Ollie McClung, Sr. testified that his restaurant, which has ample parking facilities (Tr. 35), is located on a state

highway which intersects an interstate highway eleven blocks away (Tr. 32);[6] and that he makes no effort to attract "transients" (Tr. 36).

The restaurant is of course open to the public (including Negroes if they will submit to the indignity of segregated "take-out" service), and there is no evidence that the general offer to serve the public expressed by the existence of an open restaurant has been in any way qualified to exclude an offer to serve interstate travelers, either passing through the City, or at the beginning or end of a journey, or in the City on a brief or prolonged stopover during an interstate trip.

On this state of the record, the question is whether §201 (c)(2), construed in the light of constitutional limitations, must be read as embodying a requirement that the offer to serve be—in some sense—"substantial."

Appellants submit that nothing in the purpose of the Act, its legislative history, or the Constitution requires that the statute be construed as if it had read "*substantially* offers to serve."

Numerous considerations oppose any such reading. First, an initial version of the bill contained a substantiality requirement as to actual service, but Congress amended that version and passed the bill in its present form.[7] Dele-

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[6] The sworn complaint also mentioned a truck route one block from the restaurant but asserted that no trade was derived from this route (Complaint, ¶3).

[7] The Bill, as originally introduced in the House by Congressman Celler as H. R. 7152, did contain such a limiting requirement in Sec. 202(a)(3):

> . . . (i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers . . .

tion of this requirement carries with it not only the plain implication that Congress intended no requirement that there be a substantial amount of actual service of interstate travelers, but implicates, as well, that there was no intent that offers be "substantial." If it were otherwise the independent "offer to serve" criterion would make no sense as it would refer to a highly unlikely category of restaurants; those that make a substantial offer (or effort) to serve interstate travelers but actually serve few or none.

Second, the criterion relating to movement of foods in commerce is immediately contiguous to the "offers to serve" clause and does have an explicit substantiality requirement. Congress knew how to say "substantial" when it meant to do so.

Third, Congress did desire to cover virtually all restaurants, just as it quite clearly wished to cover all hotels, motels, etc., by §§201(b)(1) and 201(c)(1), and almost all motion picture houses, etc. by §§201(b)(3) and 201(c)(3). The court below correctly assumed that the purpose of Congress was "to put an end to racial discrimination in all restaurants," save only an eccentric (and probably theretofore nonexistent) class of public restaurants refusing to admit interstate travelers and serving no substantial portion of food which has moved in commerce. The evidence is persuasive that the purpose of Congress was to enact for the nation a public accommodations law broadly comparable in coverage of restaurants (and hotels, theatres, etc., as

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Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963)

This section of the Act was changed to its present broader form after passing through the full House Judiciary Committee. *Minority Report*, H. R. Rep. No. 914, 88th Cong., 1st Sess. 79 (1963).

well to the public accommodations laws of 30 states and the District of Columbia.[8]

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[8] In presenting the Bill, Congressman Celler said:

"All we do here is to apply what those 30 States are now doing and what the District of Columbia is now doing to the rest of the States so that there shall be no discrimination in places of public accommodation privately owned. . . ." 110 Cong. Rec. 1456 (Daily Ed., Jan. 31, 1964).

The issue was sharply focused when Mr. Willis sought to amend Section 201(c) to "strike out the following, 'it serves or offers to serve interstate travelers or' and insert in lieu thereof the following: 'a substantial number of the patrons it serves are interstate travelers and.'" 110 Cong. Rec. 1901 (Daily Ed., Feb. 5, 1964).

Congressman Celler opposed the amendment:

"This amendment would change that. Instead of being in the disjunctive, it would be in the conjunctive, and the Attorney General would have to prove two things. First, he would have to prove that in a particular restaurant the service is to a substantial number of interstate travelers. Not merely to interstate travelers but to a 'substantial' number of interstate travelers. And, in addition, he would have to prove that a substantial portion of the food which is served has moved in interstate commerce. That is a proof that is twofold, and it makes it all the more difficult for the Attorney General to establish that proof. It cuts, as it were, the import of the words 'affect commerce,' which are on page 43, line 24, in half. You have this situation, for example. Whereas, in the proposal before us, many restaurants are within the orbit of the prohibition of the bill, many of such restaurants would not be covered under this amendment. Take, for example, a roadside restaurant which sells home-grown food which does not come from outside the State. That would not be covered under the amendment. Furthermore, a local restaurant which serves local people with food coming from all over the United States would not be covered under the amendment. Let me repeat that.

"We have very significant results here. *Instead of having all restaurants covered*, under this amendment you would eliminate the restaurant, for example, a roadside restaurant that sells home-grown food. You would also eliminate the local restaurant that serves local people with food that comes from all over the country. I do not think we want such a situation to develop, and for that reason I believe that the whole pur-

Fourth, an implied "substantiality" standard would make it so difficult for citizens and restaurateurs to know their rights as to completely cripple its administration. Of course, Title II contains no criminal penalties; its applicability to numerous categories of restaurants could be hammered out on a case-by-case basis in the courts. To a certain degree that is inevitable with any law. But with this law there is a clear recognition by Congress that its real effectiveness would in some measure depend upon the fact that the people of our land are law abiding and will obey the law when it is clear and unequivocal. The establishment of the Community Relations Service (Title X of the Act) to resolve disputes concerning the law without litigation (cf. §§204(d), 205), demonstrates the importance which Congress attached to obtaining voluntary compliance and avoiding many thousands of lawsuits against individual establishments.

The uncertainties that would befall the law if a substantiality test is read into the "offers to serve" criterion may be illustrated by a few questions and examples. Does the criterion cover "offers to serve" which are inexplicit as to interstate travelers, but are, because of the circumstances in which they are made, highly likely to come to the attention of such travelers? Can location be considered so that a restaurant would be covered merely by being open to the public in the immediate neighborhood of an interstate route or terminal absent any actual off-the-premises effort to attract such travelers? Would Ollie's Barbecue be in a different position if the state highway it now adjoins is made a part of the interstate highway system? Would

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pose of covering restaurants would be defeated by this amendment." (*Id.* at 1902.) (Emphasis supplied.)

The amendment was rejected at p. 1903. It should be noted that this amendment would have entirely deleted the "offer to serve" criterion.

Ollie's be covered if: (a) located two blocks from a terminal? (b) listed in a national credit card directory? (c) it advertised in a local paper with substantial interstate circulation? (d) located in a metropolitan area straddling a state line—Texarkana, for example?

We have no doubt of the capacity of the courts to resolve these and manifold similar questions which a substantiality requirement would entail. We do doubt and deny that the Congress really intended to require a Negro citizen seeking restaurant service to make these calculations before he can know his rights.[9] This should not be required, any more than Bruce Boynton was required to know the intercorporate relations between interstate carriers and the operator of a terminal restaurant in order to be protected by the Motor Carriers' Act. *Boynton* v. *Virginia*, 364 U. S. 454. The Civil Rights Act is also available as a defense against criminal charges (§203). The Eighty-eighth Congress never envisioned that it was assuring the Negro first class citizenship in restaurants only along interstate highway routes and in the more or less immediate environs of air, bus, rail or sea terminals, and only there after an almost inevitable lawsuit.

It is submitted that the "offer to serve" criterion, should be given its proper broad scope and construed to cover all restaurants save those which by some means explicitly and in good faith negative the implied invitation to serve

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[9] Senator Magnuson, presenting an analysis of Title II, said:

"Most public eating places would be within the ambit of title II because of their connection with interstate travelers or interstate commerce. And in some areas, public eating places would come within the ambit of title II, because of the factor of State action.

"At any rate, it is clear that few, if any, proprietors of restaurants and the like would have any doubt whether they must comply with the requirements of title II." 110 Cong. Rec. 7177 (Daily Ed., Apr. 9, 1964).

the general public, among whom, by definition, are interstate travelers.

B. *There Is No Proof That Ollie's Barbecue Does Not Actually "Serve . . . Interstate Travelers"; the Record Tends to Show the Contrary.*

The criterion of actual service of interstate travelers is plainly designed to complement the "offers to serve" criterion. As noted above, a substantiality requirement was deleted from the Bill in the House Judiciary Committee, and an attempt to reintroduce it was defeated on the House floor.[10] As the appellees sought and obtained an injunction against the entire Title II they had the burden of establishing that they did not fall within this criterion as well. The Court found that "*to their knowledge* plaintiffs serve no interstate travelers" (emphasis supplied). The finding exactly conformed to the interrogation of Ollie McClung, Sr. on direct (Tr. 36):

> Q. In your judgment, have you attracted any transient people or travelers? A. Not to my knowledge, Sir.

But there was no evidence that McClung had made any effort to find out whether occasional interstate travelers consumed some of the over half-million meals he serves annually. McClung claimed many regular customers and to know many "by face" (Tr. 35). Though he made quite a point of enumerating nonracial reasons why he sometimes refused service to customers (persons who had been drinking or used profanity; Tr. 48), there was no mention of a policy of refusing to serve interstate travelers. Quite plainly there was no evidence because there was no such policy. The verified complaint sworn by Ollie McClung, Sr. alleges (¶3):

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[10] See Notes 7 and 8, *supra*.

> Plaintiffs do no advertising and make no effort to attract transient customers. *Their* trade has been received and retained by virtue of the excellent quality of the food and service and the wholesomeness of the surroundings (emphasis supplied).

The referent of the word "their" in the last quoted sentence seems to be "transient customers" but the passage is not unambiguous. At the least, there was no assertion or finding that no interstate travelers were served. If such a claim had been proved, the injunction should fall for lack of standing insofar as it applies to both of the statutory criteria dealing with interstate travelers. Actually it seems probable, viewing the record on balance, that some indeterminate and perhaps small number of interstate travelers are among McClung's customers.

Neither the text of the Act nor its legislative history supports the notion that the Act is limited to restaurants serving a substantial number (or proportion) of interstate travelers. The considerations detailed above in discussion of the "offers to serve" criterion apply equally to the actual service criterion:

(a) A version containing a substantiality requirement was amended in committee, and an attempt to insert such a rule was defeated on the House floor.

(b) A substantiality rule is explicit in the criterion relating to movement of food in commerce.

(c) Congress did wish to cover almost all restaurants and to discourage easy evasion by the three criteria which undoubtedly overlap for most establishments.

(d) A substantiality rule would render the Act inadministrable, leaving persons who desire its protection in doubt as to their rights with respect to any particular place, and

thus encouraging experimentation with disobedience pending a court ruling in every case.

C. *A Substantial Portion of the Food Served by Ollie's Barbecue Has Moved in Commerce Within the Meaning of Section 201(c)(2).*

The trial court concluded "as a matter of law, on the basis of objective evidence, that a 'substantial' portion of the food served by plaintiffs has moved in commerce within the meaning of the act." The evidence amply supported this conclusion which can be sustained without gauging the ultimate reach of "substantial" in this clause. This is no borderline case.

Fifty-five percent (55%) of appellees' food purchases in dollar volume during a recent year was meat (Tr. 39), the principal commodity sold and a house specialty. Between 80 and 90 percent of this meat was purchased in Birmingham from one supplier, George A. Hormel & Co., all of whose meat came from outside Alabama. There was no evidence to show the origin of other products sold.

Thus, a substantial "portion" of the food actually served at Ollie's had come from other states. (There is no reason to believe that Congress meant the substantiality criterion to refer to an external standard, as the words plainly refer to a substantial portion of the food served by a particular establishment. But if there is an external standard, the $69,783.00 spent annually by the McClungs to buy out-of-state meat is a large and significant amount. Compare this amount, for example, with the $10,000 "amount in controversy" requirement for jurisdiction of the District Courts over federal question and diversity cases, 28 U. S. C., §§1331, 1332.)

There is no basis for a contention that Congress meant to limit coverage to restaurants which purchased directly

from out-of-state wholesale suppliers. The phrase "has moved in commerce" plainly contemplates coverage of businesses such as appellees' which purchase from local wholesalers who, in turn, are supplied with goods from other states.

Finally, the definition of "commerce" in §201(d) is conventional, drawing on the many cases defining commerce for constitutional purposes. The definition quite clearly covers the shipment of foods from state to state for eventual retail sale.

D. *As There Was No Evidence Upon Which It Might Be Decided Whether Discrimination at Appellees' Business Was Supported by State Action Within the Meaning of §201(d), the Appellees Had No Standing to Obtain, and the Trial Court No Equity Jurisdiction to Grant, an Injunction Embracing This Provision.*

No party to the case has contended that the discrimination at Ollie's Barbecue is "supported by state action" as that familiar *constitutional* phrase is given a possibly more limited *statutory* meaning in §201(d).

No evidence negated the possibility that the discrimination here was "carried on under color of" a regulation encouraging segregation like that involved in *Robinson* v. *Florida*, 378 U. S. 153, which would seem to be embraced by §201(d)(1), for example. Neither was there any record pertaining to state or local enforcement of the custom of segregation within §201(d)(2). Cf. *Lombard* v. *Louisiana*, 373 U. S. 267. As far as this *amicus* is advised, the Birmingham segregation ordinance involved in *Gober* v. *Birmingham*, 373 U. S. 374, was repealed after that decision, but again appellees made no effort to make a record.

It hardly need be said that Congress would have power under the fifth section of the Fourteenth Amendment to proscribe segregation practices of the types condemned in the

Robinson, Lombard and *Gober* cases by appropriate means. If such state support existed the Act could constitutionally be applied. *Civil Rights Cases*, 109 U. S. 3, 25. If it did not exist (and the McClungs, as proponents of the idea carried the burden to show that it did not), then the McClungs made no showing of standing to obtain an injunction against enforcement of this part of the law. Cf. *Bailey* v. *Patterson*, 368 U. S. 346.

The trial court opinion states that counsel for the United States "conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises." We do not know the exact nature of the purported concession at the unreported oral argument. It may have been merely that the government had no evidence of state involvement to present and did not rely on the state action criterion in arguing about appellees' proof. In any event, a concession of counsel is a plainly insubstantial basis upon which to enjoin enforcement of portions of an Act of Congress directly predicated upon recent decisions of this Court. Certainly, the government did not consent to such an injunction.

E. *The Suggested Interpretation Indicated in This Brief Would Enable the Various Parts of the Law to Function in a Complementary Manner to Effectuate the Congressional Purpose.*

It may readily be observed that possible constructions of the various subsections and clauses more restrictive than those urged above will present serious problems in harmonizing the various parts. For example, as noted, an interpretation that only "substantial," "significant" or "vigorous" "offers to serve" were encompassed would leave that clause a meaningless duplication of the actual service criterion.

It is hard to imagine that Congress wrote a special clause for the rare restaurant which made a vigorous effort but did not succeed in getting any interstate travelers. Conversely, if a substantial number of interstate travelers were served, why would Congress bother to provide separately for those which made "offers to serve"? That would be in contemplation of a null class of restaurants serving substantial numbers of interstate travelers, without offering to serve them—either actively or by implication.

This *amicus* suggests that the purposes of Congress in enacting the three criteria were to cover virtually all restaurants, to close loopholes and prevent easy evasion, and to conform the statutory criteria for demonstrating an effect on commerce to approved judicial reasoning on the constitutional issue of effect on commerce, in support of its underlying judgment that racial discrimination in the restaurant business affected commerce and should be regulated.

It is common knowledge that most restaurants would probably be covered by all three criteria. Congress obviously was aware of the pattern of evasion that might follow a law relying on only one of the criteria. The "white intra-state" waiting room gambit (cf. *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1861), and *Georgia* v. *United States*, 201 F. Supp. 813 (N. D. Ga. 1961), aff'd 371 U. S. 9), might have been merely the prototype of a new chain of "white intra-state only" restaurant signs if Congress had let the matter rest with the "offers to serve" criterion. But few restaurants could be expected to police such a rule. Thus the actual service criterion discourages any such attempted evasion. The criterion involving movement of food in commerce, while not so easy of evasion, does have a "substantiality" test and consequently may frequently involve considerable difficulty, time and expense in proof. In almost

any case, such proof might necessitate discovery to obtain information concerning suppliers and purchasing patterns, followed by an elaborate trial with numerous wholesalers called as witnesses to prove the origin of the food; restaurateurs will commonly have no personal knowledge of the origin of their foods and will very seldom know of such things as seasonal variations in the movement of various types of foods about the country. And, of course, a Negro traveler or resident standing in front of a restaurant with his family wondering if the law required his admission would find such a state of the law hopelessly confusing and little better than the old order.

It would do incalculable harm if all the efforts to narrow the Act which failed in Congress were to be engrafted on it by construction.

The relation of the statutory criteria to the constitutional reasoning supporting this exercise of the Congressional power to "regulate Commerce . . . among the several States" will appear below. Also, of course, all the arguments that demonstrate the reasonableness of the proposed constructions tie in with the constitutional questions concerning what Congress might reasonably be empowered to do. But it should be noted that Congress deleted from the bill a broad criterion for coverage which would have required that a litigant prove that an offending restaurant's operations *affected* travel or the movement of goods.[11]

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[11] See Section 202(a)(iii) of H. R. 7152 (discussed in n. 7 above) providing for coverage if:

> "(iii) the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, . . ." (*Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963).)

The deletion of this provision and insertion of the present criteria was an expansive thrust by Congress and a recognition that administration of the Act would be made difficult by the requirement of having to make such a record.

II.

The Power of Congress to Regulate Commerce Among the States Supports Title II of the Civil Rights Act.

First, a few general principles. In 1824 Chief Justice Marshall wrote that commerce was "a general term, applicable to many objects," that it "undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, 189-190. The vast power granted was recognized:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution (22 U. S. (9 Wheat.) 1, 196).

And Chief Justice Marshall, the champion of judicial review, added:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments (22 U. S. (9 Wheat.) 1, 197).

The rules governing exercise of the commerce power stated in *Gibbons* v. *Ogden*, *supra*, are still vital today. Con-

gress is barred from regulation only of "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." (Ibid. at 194; emphasis supplied.) That commerce which does "affect other states" is within the regulatory power of Congress.

Before proceeding to the particulars of this case, and the reasoning supporting this particular regulation we discuss two matters argued by appellees which apparently furnish some of the basis for the opinion below. First, Title II has been criticized because Congress inserted no findings in the Act that regulating intrastate activities was necessary. Second, the Act is criticized because Congress provided restaurateurs no administrative or judicial forum to litigate whether racial discrimination in their facility affected commerce among the states.

To the former objection one may say, as this Court did in *United States* v. *Carolene Products*, 304 U. S. 144, that the Act carries a presumption of constitutionality, and a presumption that Congress has acted rationally whether or not it sets out "findings":

> Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators (304 U. S. at 152).

As to the second objection, the congressional power to decide when regulating commerce is appropriate has been

clear since *Gibbons* v. *Ogden, supra.* Congress has sometimes provided for judicial and administrative determinations of the effect of particular practices on commerce, but it has also on numerous occasions made the legislative determination that a particular practice affecting commerce must be regulated or prohibited. Mr. Justice Stone wrote in *United States* v. *Darby,* 312 U. S. 100, 120:

> But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.
>
> In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act [Fair Labor Standards Act], the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger,* 250 U. S. 199 . . .; *Virginian R. Co.* v. *System Federation, R. E. D.,* 300 U. S. 515, 533. . . .

Darby brings us to the central issue at hand. Can it fairly be said, as the Court below held, that Congress could not rationally have believed, considering the information available, that racial discrimination in virtually all types of public restaurants (save only those rare and insulated places which serve only local food to local people) affects commerce.

We submit but a few of the lines of reasoning which may support such a regulation. Congress surely can regulate in light of the aggregate effect of numerous enterprises, large and small, engaged in a particular practice. *Wickard* v. *Filburn*, 317 U. S. 11, should settle that. It would be an incredible disablement of the Congress to overturn *Wickard* and limit congressional power to regulate components of an industry to where it can be demonstrated as to each component, to the satisfaction of the courts, that the individual practitioner of a prohibited practice has the apprehended adverse effect on commerce.

This would be just as true of the non-communist affidavit provision of the Taft-Hartley Act (*American Communications Assn.* v. *Douds*, 339 U. S. 382) or the prohibition against counterfeit bills of lading upheld in *United States* v. *Ferger*, 250 U. S. 199, as it was of the unfair labor practices condemned in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601, 606, where the Court held immaterial "the smallness of the volume of commerce affected in any particular case." See *N. L. R. B.* v. *Reliance Fuel Corp.*, 371 U. S. 224.

The Act can be sustained by reference to the congressional power to regulate matters affecting interstate travelers. The movement of persons is "commerce." *Edwards* v. *California*, 314 U. S. 160; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. Congressional power is not dependent on a finding that local practices have completely *blocked* interstate travel, or that the practices have affected

the *volume* of travel. Congress can regulate to promote the safety, ease, pleasure and convenience of interstate travel, to assure that travel is not embarrassed or disturbed, to promote travelers' "freedom of choice in selecting accommodations." Cf. *Morgan* v. *Virginia*, 328 U. S. 373, 381, 383.

Surely if the Congress can compel the humane treatment of cattle, sheep and swine by requiring carriers to unload them for rest, water and feeding for five consecutive hours every twenty-eight hours (Live Stock Transportation Act of 1906; 34 Stat. 607; 45 U. S. C. §§71-74), it can promote the convenience of human travelers. Cf. *Boynton* v. *Virginia*, 364 U. S. 454. There is no constitutional ground for limiting the congressional power to prohibit racial discrimination to restaurants located within terminals, for other accommodations also affect travelers. Interstate travelers using common carriers commonly wander from the main routes of commerce during stops for business or pleasure reasons. Vacationing motorists do the same. Congress is empowered to promote the convenience of travel of Negro citizens by assuring that public accommodations generally are open to them.

The statutory criteria dealing with the movement of foods are also directly related to the constitutional power. The power of Congress to prohibit the shipment of goods in commerce is well established (*Champion* v. *Ames*, 188 U. S. 321), and this is true without regard to the "innocent" character of the goods involved. *United States* v. *Darby*, 312 U. S. 100, 116-117, overruling *Hammer* v. *Dagenhart*, 247 U. S. 251. Congress could prohibit the shipment of food in commerce for sale in restaurants that practice racial discrimination, or the acquisition of goods from the channels of commerce for such purpose. It did prohibit the shipment of goods manufactured under substandard labor conditions (*United States* v. *Darby*, *supra*). The fact that

the one case involves "shipment in" and the other "shipment out" does not diminish the congressional power. Cf. *McDermott* v. *Wisconsin*, 228 U. S. 115; *United States* v. *Sullivan*, 332 U. S. 689. The effect of such a drafting of the public accommodations law would be to deny to discriminating restaurateurs access to the great national market in foodstuffs in aid of a practice which Congress wants to halt. Yet the actual law, drafted so as to be much more manageable administratively, and so as to fasten the regulation directly upon the discriminator serving food which has moved in commerce, accomplishes exactly the same thing. There is no interest to be served by requiring Congress to use an awkward method rather than a direct method for controlling an evil it has power to prohibit.

And, of course, it is no valid objection to a regulation or prohibition of commerce that Congress is partly, or even primarily concerned with fostering the public good or morality. *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Darby*, *supra*, at 116; *United States* v. *Rock Royal Co-Operative*, 307 U. S. 533, 569.

Numerous other arguments support the regulation involved. Among those which have been argued by the United States are the power of Congress to cope with the injury to commerce caused by racial strife, including boycotts and similar demonstrations (cf. *N. L. R. B.* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1); the power of Congress to eliminate the artificial restrictions on the market for goods imposed by discrimination practices; the power to promote the volume of travel; and the power to reduce other economic dislocations resulting from discrimination in places of accommodation. All of these factors were indeed considered by the Congress which had much evidence on these matters before it, as the United States has demonstrated at length

in its brief in this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, October Term 1964.

Finally, it should be reemphasized that the volume of commerce affected in the particular case is not determinative of the congressional power (*N. L. R. B.* v. *Fainblatt*, 306 U. S. 601), nor is the partially "local" character of the particular operation, *United States* v. *Women's Sportswear Mfg. Assn.*, 336 U. S. 460, 464 ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"). In *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, the Court was "not impressed" by an argument that the Sherman Act "could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective" (347 U. S. at 189). In that case, as in this one, the products had come to rest never again to move in commerce, yet Congress had power to regulate. The application of the Federal Food, Drug, and Cosmetics Act of 1938 to a retailer selling drugs purchased from a wholesaler nine months after completion of interstate shipment demonstrates the scope of power to deal with local retail transactions. *United States* v. *Sullivan*, 332 U. S. 689.

III.

Title II Does Not Offend Any Other Constitutional Provisions.

The District Court concluded its opinion by holding that Title II violated appellees' rights under the due process clause of the Fifth Amendment. The Court summarily rejected the appellees' elaborate argument that the law violated the Thirteenth Amendment. The extent of the District Court's reliance upon the Tenth Amendment, which was quoted in the opinion, is unclear. We shall discuss these provisions in turn.

A. *A Requirement That Restaurateurs Open to the Public Provide Service Without Racial Discrimination Does Not Violate the Fifth Amendment Due Process Clause.*

If the District Court's Fifth Amendment holding is taken to mean only that the Congress was without power to enact the law under the commerce clause, the preceding argument is sufficient answer to it. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43-47; *United States* v. *Darby*, 312 U. S. 100, 125-126.

But perhaps the argument contends that notwithstanding the commerce power, the right to racially discriminate in a public restaurant, is a liberty or property right so basic and fundamental that it may not be regulated by government at all. This argument would, of course, apply equally to invalidate all state public accommodations laws under the due process clause of the Fourteenth Amendment.

The argument is totally unsupported by precedent. The validity under the due process clause of state law requiring equal treatment in public accommodations has always

been assumed. Cf. *Civil Rights Cases*, 109 U. S. 3, 17-18, where the Court compared racial discrimination by businesses open to the public with other "private wrongs" and the discriminating businesses were said to be "answerable therefor to the laws of the State where the wrongful acts are committed." Even more directly applicable is this statement in *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100, 109:

> And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.

And see *Railway Mail Assoc.* v. *Corsi*, 326 U. S. 88, directly rejecting a due process objection to a state law prohibiting discrimination in employment. Cf. *Colorado Anti-Discrimination Com.* v. *Continental Air Lines*, 372 U. S. 714; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 34.

Actually, the result urged by appellees would be inconsistent with a host of decisions of this Court; to name but a few: *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Boynton* v. *Virginia*, 364 U. S. 454; *Peterson* v. *Greenville*, 373 U. S. 244; *Henderson* v. *United States*, 339 U. S. 816; and *Mitchell* v. *United States*, 313 U. S. 80.

B. *The Thirteenth Amendment Is No Bar to the Act.*

The McClungs' elaborate Thirteenth Amendment argument below is difficult to regard as serious; the District Court saw nothing in it. It should be remembered that this argument too would invalidate every state public accom-

modations law. Actually, if taken seriously, it would prevent almost all economic regulation. It is perhaps sufficient to note that the argument never comes to grip with the obvious choice open to any proprietor unwilling to obey a public accommodations law—but not open to slaves—that is, to quit and do something else for a living.

This Thirteenth Amendment claim has an especial irony, in that the McClungs purport to assert the rights of their employees, most of whom are Negroes. This Court has rejected attempts like this one to pervert the meaning of the Thirteenth Amendment from the time of its first construction of the Amendment. *Slaughterhouse Cases*, 83 U. S. (18 Wall.) 36, 67-72. Cf. *Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 199; *Arver* v. *United States* (Selective Draft Law Cases), 245 U. S. 366, 390.

C. *The Tenth Amendment Does Not Invalidate Title II.*

The plenary power of Congress over commerce has been plain from the beginning. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, 197; *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 407, 421; *Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419. The Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U. S. 100, 124. The Amendment does not limit the power of Congress to regulate commerce by means appropriate to the permitted end. No matter what "doubts may have arisen of the soundness of that conclusion" during a brief period in the Court's history, they have been "put at rest." (*Id.*)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS DEB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

OLLIE MCCLUNG, SR., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

SUPPLEMENTAL BRIEF FOR THE APPELLANTS

On oral argument of this case, it was suggested that appellees' suit in the district court might have been appropriate as a declaratory judgment action, even if it was erroneous to enjoin the enforcement of the Civil Rights Act in the absence of any showing of irreparable injury to the plaintiffs. It is true that declaratory relief, unlike injunctive relief, may be appropriate even though reliance on legal remedies would not result in irreparable injury. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 262–263; Rule 57, Federal Rules of Civil Procedure. But long-established policies of avoiding premature and possibly unnecessary decision of constitutional questions

747-120—64

and unwarranted interference with the enforcement of a regulatory statute apply with full force to a suit for declaratory relief. These policies have led us to assert the impropriety of a district court action such as that entertained below. While we recognize that the present posture of the case and the circumstance that a related issue is *sub judice* in the companion *Heart of Atlanta* case may justify an adjudication of the merits, we believe it highly important that the Court make clear that actions for either declaratory or injunctive relief against the Civil Rights Act of 1964 should not be entertained by the district courts.

1. In our prior brief we showed that appellees are in no way harmed by the mere existence of the statute authorizing the Attorney General to sue for preventive relief. Allowing an adjudication of the constitutionality of a federal statute in a context where private parties incur no "very real disadvantages" from deferring decision, does not comport with this Court's "policy of strict necessity in disposing of constitutional issues." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568, 571–572. This policy, supplementing the case-and-controversy rule (*id.* at 570–571), is fully applicable to declaratory judgment proceedings. *Id.* at 572–573. Just as the abandonment, in declaratory judgment proceedings, of such traditional prerequisites for equitable jurisdiction as inadequacy of legal remedies does not "overcome the case and controversy requirement, no more was this intended to discard the corollary policy effective within the limits of conceded jurisdiction" that federal or State statutes

not be held unconstitutional absent the strictest necessity. *Id.* at 573, n. 41. See, also, *Federation of Labor* v. *McAdory,* 325 U.S. 450, 461.

Thus, even when the plaintiff seeks only declaratory relief, "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman,* 367 U.S. 497, 504. And here the plaintiffs are in no way harmed or threatened with harm by the possibility of a suit against them for preventive relief.

2. We have shown, at pages 18 to 21 of our main brief, that permitting suits like that entertained in the present case would needlessly interfere, in a most substantial way, with the normal processes of administration and enforcement. This is also true of suits for declaratory relief. The Court's decision in *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, is directly in point. There the Court first noted "that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer" (*id.* at 297). The same considerations of avoiding "[i]nterference with state internal economy and administration" were held to impose on the federal courts a corresponding "duty to withhold [declaratory] relief" when the State "affords an adequate remedy to the taxpayer"

which "leaves undisturbed the state's administration of its taxes" (*id.* at 298, 300–301). Cf., *Des Moines* v. *Des Moines City Ry. Co.*, 214 U.S. 179; *Cincinnati* v. *Cincinnati & Hamilton Traction Co.*, 245 U.S. 446.

In cases under Title II of the Civil Rights Act of 1964, there is a wholly adequate remedy for private parties—asserting their contentions as defenses in proceedings for preventive relief—which leaves undisturbed the federal government's administration of the statute. As in the *Great Lakes* case, this consideration makes inappropriate declaratory relief, as well as injunctive relief. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. * * * It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431.

Indeed, as this Court observed in *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243, "In recommending Rule 57 of the Federal Rules of Civil Procedure, in order to provide procedures for the declaratory decree, the [Advisory] Committee noted 'A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case * * *.'" Sections 204 and 206 of Title II provide such "special statutory

proceeding[s]" for the determination of rights and duties under Section 201 of the Act.

3. This Court's decisions in *Kennedy* v. *Mendoza-Martinez* and *Rusk* v. *Cort*, 372 U.S. 144, cast no doubt on the principles stated above. Mendoza-Martinez was threatened with immediate deportation on the basis of the statute he attacked (372 U.S. at 147–148); Cort was denied a passport to return to the United States on the same ground (372 U.S. at 151–152). Both thus showed the immediate harm and necessity of judicial relief which is wholly lacking where a party sues to enjoin a possible later suit for an injunction under Title II of the Civil Rights Act of 1964.

CONCLUSION

We recognize that the unique posture of the present case—where the interference with administration of the statute caused by unauthorized district court proceedings has already occurred and the constitutionality of the statute is already in issue before this Court in a closely related case properly entertained by another district court—may make the discretionary denial of declaratory relief unnecessary in this particular instance. If this be so, however, it becomes the more important, in our view, that this Court make clear, for the guidance of the lower courts, that they should not entertain suits of a similar character.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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INDEX

	Page
Statement	1
Argument	2
Introduction	2
I. The Legislative History Shows That Congress Neither Could Have Nor Did Make the Finding Claimed by Appellants	4
1. There Was Nothing Before Congress to Support the Finding Claimed	5
2. No Such Finding Was in Fact Made	11
II. Prior Statutes Provide No Precedent for Title II	16
1. Statutes Regulating Goods or Activities "In Commerce"	17
(a) Statutes Regulating the Movement of Goods in Commerce	17
(b) Statutes Regulating Instrumentalities of Commerce	20
2. Statutes Extending Interstate Regulation to Commingled Intrastate Activities	21
(a) Statutes Regulating "Local" Activities in Association With Control of Interstate Instrumentalities	21
(b) Statutes in Which "Local" Activities Are Reached in Association with Economic Regulation of Interstate Commodities	22
(c) Statutes in Which Control of Local Activities Is Necessary to the Effective Control of the Interstate Movement of Harmful Articles	27

3. Statutes Regulating Local Activities When Found on an Ad Hoc Basis to Affect Commerce 30

III. A Mere Hypothetically Rational Basis for the Exercise of Federal Power Is Not Sufficient ... 37

Conclusion 41

Appendix A 43

Cases Cited.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 485, 498 .. 32

Bailey v. Alabama, 219 U. S. at 239..... 27
Baltimore & O. R. R. v. I. C. C., 221 U. S. 612 ....22, 34
Board of Trade v. Olsen, 262 U. S. 1 .....23, 24

Currin v. Wallace, 306 U. S. 1, 10.....23, 24

Duplex Printing Press Co. v. Deering, 254 U. S. 443 12

Federal Trade Commission v. Mandel Bros., Inc., 359 U. S. 385, 391 .....28, 35

Heiner v. Donnan, 285 U. S. 312 27

Industrial Ass'n v. United States, 268 U. S. 64 33

J. L. Brandeis & Sons v. N. L. R. B., 142 F. 2d 977, 980 (C. A. 8) 31

Kentucky Whip & Collar Co. v. Illinois Cent. R. R., 299 U. S. 334, 352-53 .....18, 19
King v. United States, 344 U. S. 254, 267-76 30
Kinsella v. United States ex rel. Singleton, 361 U. S. 235 38

Lorain Journal Co. v. United States, 342 U. S. 143 ... 33

Marbury v. Madison, 1 Cranch. 137 41
McDermott v. Wisconsin, 228 U. S. 115, 135 .....18, 19
Moore v. Mead's Fine Bread Co., 348 U. S. 115 33
Mulford v. Smith, 307 U. S. 38 .....23, 24

N. L. R. B. v. Denver Bldg. and Constr. Trades Council, 341 U. S. 675, 683-84 31
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 40
North Carolina v. United States, 325 U. S. 507, 511 .. 30

Reid v. Covert, 354 U. S. 1 38
Roland Elec. Co. v. Walling, 326 U. S. 657, 669..... 19

Second Employers' Liability Cases, 223 U. S. 48 22
Shreveport Rate Case, 234 U. S. 342, 353.....22, 24, 30
Southern Ry. v. United States, 222 U. S. 20 .....22, 34
Stafford v. Wallace, 258 U. S. 495 24

Tot v. United States, 319 U. S. 463..... 27
Townsend v. Yeomans, 301 U. S. 441 36
Trop v. Dulles, 356 U. S. 86 39

United States ex rel. Toth v. Quarles, 350 U. S. 11 ... 38
U. S. v. Carolene Products Company, 304 U. S. 144 ... 36
United States v. Darby, 312 U. S. 100, 110, 117, 118 .....19, 23, 25, 40
United States v. Employing Plasterers Ass'n., 347 U. S. 186 31
United States v. Ferger, 250 U. S. 205 .....27, 34
United States v. Five Gambling Devices, 346 U. S. 411, 446-48, 460 .....17, 27, 34
U. S. v. St. Paul, M. & M. Ry., 247 U. S. 310 12
U. S. v. Sullivan, 332 U. S. 689, 696.....19, 27, 28, 29, 35
United States v. Women's Sportswear Ass'n, 336 U. S. 460 32
United States v. Wrightwood Dairy Co., 315 U. S. 110, 121 .....23, 25, 26, 30
United States v. Yellow Cab Co., 332 U. S. 218 ....32, 33

Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 554-57.....22, 35

Wickard v. Filburn, 317 U. S. 111 .....23, 25, 34, 40

Statutes Cited.

Agricultural Adjustment Act of 1938, 7 U. S. C., §§ 1281 et seq. 23, 26
Agricultural Marketing Agreement Act of 1937, 7 U. S. C., §§ 601, 608 ..... 23, 25, 26, 30
Ashurst-Summers Act, 49 Stat. 494 18
Fair Labor Standards Act of 1938, 29 U. S. C., §§ 201 et seq. 23, 26, 35
Food and Drug Act of 1906, 34 Stat. 768 18
Grain Futures Act of 1922, 42 Stat. 998 ..... 23, 35
Interstate Commerce Act, 49 U. S. C., § 13 (4) 30
National Labor Relations Act, 29 U. S. C. 151 et seq. 31
Robinson-Patman Act, 15 U. S. C., § 13 (a) 33
Sherman Act, 26 Stat. 209, 15 U. S. C., § 1 et seq. 31
Tobacco Inspection Act, 7 U. S. C., § 511a 23, 26, 35
15 U. S. C., § 69 ..... 18, 28, 35
15 U. S. C., § 70 ..... 18, 35
15 U. S. C., § 692 19
15 U. S. C., § 1172 18
15 U. S. C., § 1231 35
18 U. S. C., § 1201 18
18 U. S. C., § 1301 18
18 U. S. C., §§ 2312-2317 18
18 U. S. C., § 2421 18
21 U. S. C., §§ 61-63 36
21 U. S. C., § 331 ..... 18, 19, 27
21 U. S. C., § 347a 25, 26, 35
29 U. S. C., §§ 206, 207 ..... 18, 19
45 U. S. C., §§ 1-16 ..... 21, 35
45 U. S. C., § 51 ..... 20, 22
45 U. S. C., §§ 61-64 20-22
45 U. S. C., §§ 151 et seq. 22, 35
45 U. S. C., § 157 20
49 U. S. C., § 1 ..... 20, 22
49 U. S. C., § 26 35
49 U. S. C., § 81 20
49 U. S. C., § 121 ..... 27, 35

Miscellaneous Cited.

Cong. Rec. 6237 (March 26, 1964) 6
Cong. Rec. 6308 (March 30, 1964) 12
Cong. Rec. 6832 (April 7, 1964) 13
Senate Report No. 308, 81st Cong., 2nd Sess., 1950
U. S. Code, Cong. News, at 1973 25

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Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

SUPPLEMENTAL BRIEF FOR APPELLEES.

STATEMENT.

On October 5, 1964, the Court granted the parties' Joint Motion to Expedite Briefing and Oral Argument providing inter alia for the filing of supplemental briefs after oral argument.

This brief is filed pursuant to that order and is submitted for consideration of the Court both in reply to the opening brief of appellants and in response to certain questions raised by the Justices during oral argument.

No further statement of the case or of the facts is deemed necessary.

ARGUMENT.

INTRODUCTION.

In appellant's brief and again in the Solicitor General's oral argument, it was stated that appellant's major premise is that Congress has the power to regulate intrastate activities, not themselves a part of interstate commerce, if they have a close and substantial relation to interstate commerce. Appellees have repeatedly sought to make it clear that they have no quarrel with that premise.

Appellant's minor premise was to the effect that Congress "had ample basis upon which to find that racial discrimination at restaurants which receive from out-of-state a substantial portion of the food served, does, in fact, impose commercial burdens of national magnitude upon interstate commerce". Brief for Appellants at 26.

It is with appellant's minor premise as thus stated that appellees take issue, on two basic grounds:

1. Congress made no such finding as claimed by appellants.

2. There was no ample basis upon which any such finding could have been made.

The point from which all argument in this case must proceed is that the federal government is one of delegated powers. Every statute enacted by the federal congress must come within some specific power given under the Constitution. In Title II of the Civil Rights Act of 1964, Congress purported to exercise power given to it under both the Interstate Commerce Clause and the 14th Amendment. The issues in this case present no question under the 14th Amendment. If the statute may constitutionally be applied to appellees, it must necessarily be because,

as so applied, it comes within the authority given to Congress under the Interstate Commerce Clause. The broad principles upon which this issue must be resolved are not in substantial dispute in this case. Appellants concede that the activities of the appellees sought to be regulated by the statute are local and intrastate; that they are in no sense in, or a part of, interstate commerce. Appellants further concede that in order for the activities to be regulated in the manner attempted, there must be a finding or showing that they bear a close and substantial relation to interstate commerce. Finally, appellants concede that the statute makes no provision for a case-by-case determination of such a relationship (between discrimination in an individual restaurant and interstate commerce) and thus concede one of the principal points made in appellees' opening brief. Nor do appellants argue that the conclusive presumption of an effect on commerce established under the so-called "food test" is valid. They state:

> We have no need to argue whether the fact that a restaurant serves food which originated in other States is a sufficient basis for the regulation. Brief for Appellants at 36, 37.

They avoid that argument by attributing to Congress a legislative finding to the effect that racial discrimination at restaurants serving food, a substantial portion of which has previously crossed state lines, imposes a commercial burden upon commerce. Thus, they undertake to deny that the food test in Section 201 (c) is intended as an evidentiary presumption of an actual effect upon commerce and, instead, insist that it is merely a coverage provision bringing an individual restaurant within the scope of a finding claimed by appellants, in their minor premise, to have been made by Congress.

Appellants present no argument on the first point raised by appellees, i. e., that no such finding was made. They

are content to rest their case on that point by merely urging that formal and explicit legislative findings are not required. This hardly meets the question. Appellants themselves, in stating their minor premise, necessarily make the contention that a finding was made.[1] Most of their argument, however, is devoted to the second point mentioned above, i. e., whether Congress had any basis upon which such a finding could be based. In doing so, they rely entirely upon the legislative history of the statute.

It is appellees' contention that the legislative history is heavily persuasive in their favor on both of these points. It discredits the contention that any such finding was made and it is wholly lacking of any support for such a finding if one can be assumed.

I. The Legislative History Shows That Congress Neither Could Have Nor Did Make the Finding Claimed by Appellants.

At the outset, it should be pointed out that appellees have never in this case relied primarily upon the legislative history. It is the appellants who have done so. Appellees have taken the position that the structure, arrangement and language of the statute itself are amply persuasive that Congress made no such finding as is contended by appellants. However, appellees regard their position as supported by the legislative history. Moreover, they believe that for reasons that will be shown, there was nothing before Congress upon which any such finding, particularly relating to food which has moved in commerce, could have been based.

---

[1] Appellants state that Congress "had ample basis upon which to *find* that racial discrimination, etc." Brief for Appellants, at 26.

1. There Was Nothing Before Congress to Support the Finding Claimed.

It is well to remember that appellants both in their brief and in oral argument have relied almost entirely upon certain testimony offered by the proponents of the legislation before the Senate Committee on Commerce. Significantly, appellants have at no time pointed to any testimony before that Committee or any other committee, or even in either house of Congress, that related to restaurants serving food which has previously crossed state lines or the fact that a customer selection practice at any such restaurant would in any way result in a burden upon commerce (as is specifically claimed by appellants in their minor premise).

The history of the legislation that became the Civil Rights Act of 1964 does not lend itself to a brief, comprehensive summary. Early in the 88th Congress, a large number of bills relating to civil rights in various aspects were introduced in both houses of Congress. President Kennedy had made recommendations concerning legislation of this type in both February and in June of 1963. It was clear from the beginning that a majority of the two houses of Congress favored some kind of civil rights legislation, but in the earlier stages there was considerable disagreement as to the scope of the legislation. Public accommodations provisions were included in many of the proposed bills, but there was a wide disparity of opinion as to what constitutional basis, if any, would support such legislation.

At this juncture an administration-sponsored bill was sent to the Senate. This was S. 1731. Although S. 1731 covered the general topics included in the House bill ultimately passed, there were substantial differences in structure, coverage, language and legislative technique. Hearings on S. 1731 were conducted before the Senate

Committee on the Judiciary in 1963. In early 1964, the Senate Committee on Commerce conducted hearings on S. 1732 which pertained only to public accommodations. Its provisions were identical with those in Title II of S. 1731. It was during the Senate Committee hearings that the evidence relied upon by appellants in their brief was offered. There was much discussion before the two Senate committees of facts relating to the difficulty with which Negroes plan trips, as well as to the economic effects of riots, demonstrations and boycotts. Significantly, these discussions were not directed at restaurants and at no time was any consideration given to the movement of food across state lines, or a possible burden upon that movement resulting from racial discrimination in restaurants. This was not an oversight, for as will be shown, S. 1731 and S. 1732 did not purport to cover restaurants on the basis of a food test like that now contained in the Civil Rights Act of 1964. The Senate bills were not passed.

Meanwhile, the House of Representatives was considering H. R. 7152. After hearings, the House Judiciary Committee reported the bill out favorably, but H. R. 7152 as it reached the House floor was a substitute bill that had not been considered by that committee in its emerging form. Senator Dirkson, who favored the legislation, later remarked in the Senate, "the bill [H. R. 7152] that is now before us did not receive even a one-day hearing before the House Judiciary Committee." Cong. Rec. 6237 (March 26, 1964). The House of Representatives passed H. R. 7152 as reported from the committee. It then went to the Senate in February of 1964.

In the Senate, Senator Morse tried desperately to have the bill submitted to the Senate Committee on the Judiciary in order that a legislative history for the benefit of the courts could be made. Senator Morse's motion to this effect was defeated and the lengthy debates in the Senate

began. In June of 1964, H. R. 7152 passed the Senate. Although the Senate amended certain portions of the bill, none of these is pertinent in any way to the issues raised in this case. The public accommodations provisions were not changed except in respects that are not here material.

When the bill was returned to the House, no further amendment was effected. The bill was passed as it left the Senate and became the Civil Rights Act of 1964 on July 2, 1964.

Significantly, then, the Act that is now before the Court did not receive, in the words of Senator Dirksen, "even a one-day hearing before the House Judiciary Committee", and it received no hearing in any Senate Committee.

Since appellants in this case rely upon evidence adduced in the hearings before the Senate committees and since appellees deny that there was any evidence offered there to support any "finding" of the type claimed by appellants to have been made, it is appropriate, if not necessary, to take a closer look at the Senate bill as it was written when those hearings were conducted.

S. 1731 and 1732 were alike except that the latter pertained only to Title II. They were conceived on a different basis from H. R. 7152. Sections 201 and 202 of S. 1731 are attached as an appendix to this brief.[2] Section 201 of Title II of the Civil Rights Act of 1964, formerly H. R. 7152, appears as an appendix to appellant's jurisdictional statement.

When the two are laid side by side a number of material differences are immediately apparent. While a detailed analysis of these differences would unduly lengthen this brief and still fail to eliminate the necessity

[2] The only difference between § 1732 and Title II of § 1731 was section numbers. Only § 1731 is copied herein.

for actual comparison, a few general observations as to the differences may be helpful:

First, S. 1731 contained specific legislative findings in Section 201. There are no findings in Title II of the Civil Rights Act of 1964.

Second, the findings in S. 1731 were primarily devoted to interstate commerce, but also included a finding relating to the 14th Amendment. This is in Section 201(h).

Third, none of the findings in Section 201 of S. 1731 related specifically to restaurants. The only reference to restaurants in the entire section was in Section 201(g) which was directed at an alleged difficulty encountered by business organizations in obtaining the services of skilled workers in the professions. This was in no way related to the matter of customer selection in a restaurant using food from out of state or the movement of food at all.

Fourth, retail establishments were specifically mentioned in Section 201(c) in connection with the movement of "goods sold", but restaurants, obviously treated in the bill as something different from a retail establishment, were not mentioned in that subsection.

Fifth, the term "public accommodations" to categorize the covered establishments was not used in S. 1731 as was done in the Act finally passed by Congress. Thus there is no counterpart to Section 201(b) of the Civil Rights Act of 1964.

Sixth, there is no "state action" criterion of coverage in S. 1731, as is the case in the statute itself. Thus, while power under the 14th Amendment was invoked generally as evidenced by the findings, S. 1731 did not contemplate the 14th Amendment as a separate criterion of coverage.

Seventh, S. 1731, unlike the present statute, covered retail stores and other places "which keep[s] goods for

sale." Sec. 202(a)(3). This explains the reference in the findings to retail establishments and the flow of **goods** in the interstate market.

Eighth, restaurants are included in Section 202(a)(3), but in a different generic sense from retail shops, etc. The latter category is followed by a reference to "other public place which keeps **goods** for sale", whereas restaurants, etc., are followed by a reference to "other public place engaged in selling **food** for consumption on the premises" (Emphasis supplied).

Ninth, in S. 1731 there was no separate interstate commerce test for restaurants as such. 202(a)(1)(i) of that bill related to goods, services, etc., "provided to a substantial degree to interstate travelers." Thus it was similar to Section 201(c)(2) of the present statute (although not employing the concept of "offers to serve" and therefore both far clearer and more restricted). Section 201(a)(3)(ii) applied where "a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent or hire has moved in interstate commerce." This subsection made no reference to the food served by a restaurant but only to the sale of "goods" which, as noted above, is treated separate from "food" in paragraph 202(a)(3).

Finally and significantly, under Section 202(a)(3)(iii) (of S. 1731 and S. 1732), there was a provision bringing an establishment within the Act if "the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce." This provision necessarily contemplated the determination of an actual effect upon interstate commerce in each individual case. This, of course, might be applicable to a restaurant. In fact, except for a restaurant serving interstate travelers to a substantial degree, it would be the only way a restaurant would be covered under the Senate bills.

From the above (and certainly other differences can be noted), it is apparent that the Senate committees considering S. 1731 and S. 1732 were not confronted with a proposed statute that in any respect relied upon a restaurant's mere serving of food that has crossed state lines to bring it under the statute. Understandably there was no reason for any such consideration on the part of the two Senate committees. No evidence on the point was offered because the proposed legislation simply was not oriented in that direction.

Under S. 1731 a restaurant would have been covered if its serv -s, facilities, etc., were provided to a substantial degree to interstate travelers. Certainly there was evidence before the committees that interstate travel of persons was impeded by discriminatory practices in those facilities actually serving interstate travelers. Under Section 202(a)(3)(iii), a restaurant might also be brought within the coverage of the Act if its activities or operations in fact substantially affected interstate travel or the interstate movement of goods in commerce "otherwise." But this required an ad hoc determination of an effect on commerce in each individual case as is the case under the National Labor Relations Act.

There can be no argument that a particular restaurant might well have come within that coverage in a given case upon the authority of some of the National Labor Relations Board decisions. However, this is quite a different thing from saying there was a finding on the part of Congress that the racial policies of restaurants serving food which has moved in commerce has a burdensome commercial effect on interstate traffic.

The point here is that all of the testimony from Under Secretary Roosevelt, Attorney General Kennedy and others before the Senate Committee on Commerce, must be considered in the context of the proposed legislation before the Committee. It is an unwarranted distortion of the

facts to say, as do appellants, that Congress had "ample basis upon which to find" that customer selection at restaurants serving food which has crossed state lines places a commercial burden upon interstate commerce. In truth, there was no reason for an inquiry along this line and the matter was not even before either congressional committee.

2. **No Such Finding Was in Fact Made.**

Not only does the legislative history show that there was no "ample basis" for any such finding, but also that no such finding was made.

Aside from the fact that no formal findings were included in H. R. 7152 as was the case in S. 1731,[3] neither the provisions of Title II of the Civil Rights Act of 1964, nor the legislative history lends any support to the contention of appellants that such a finding was made.

Whether Congress made any such finding is, fundamentally, a matter of its intention. Appellees have at all times contended that the statute on its face shows no such finding and, indeed, persuades strongly to the contrary. The definition of "place of public accommodation" under Section 201 (b) of the Act, uses the language "if its operations affect commerce". These words are not followed by any such language as "as hereinafter further defined" or any other language that indicates that the words, "affect commerce" should be given any meaning other than a normal one. Later, in Section 201 (c), it is provided, of course, that a restaurant's operations do affect commerce if a substantial portion of the food which it serves has moved in commerce. It is difficult to see why Congress would have employed the language and arrangement of the statute if it had intended to base

[3] The importance and, in some instances, the necessity for specific findings, is discussed in a later portion of this brief.

coverage upon a finding of the type urged by appellants. It would have been far more simple and more direct to have included an additional line in Section 201 (b) (2) and eliminate the necessity for Section 201 (c) (2) entirely. Certainly the statute on its face discloses no intention to make any such determination as is relied upon by appellants.

In any event, the most that could be said to support appellants is that the statute itself is not clear insofar as Congress' intention in this regard is concerned. Under these circumstances, it is appropriate to inquire whether the legislative history throws any light upon the point.

In determining the intention of Congress, this Court has often recognized that remarks made by individual congressmen or others, either in committee hearings or on the floor of Congress, are not reliable guides as to congressional intent. Nothing said before the Senate Committee on Commerce could therefore throw any light upon congressional intent with respect to the particular point of whether Congress made any determination or finding as is contended in appellant's minor premise. This is, of course, particularly true where the bill before a committee was an entirely different one from that finally enacted into law. Committee reports are frequently looked to by the courts in determining what Congress intends. **Duplex Printing Press Co. v. Deering**, 254 U. S. 443. As shown, there was no committee report on this bill. Under these circumstances, it is appropriate to look to the statements of the floor managers during congressional debate. **U. S. v. St. Paul, M. & M. Ry.**, 247 U. S. 310. Senator Humphrey was the admitted commander of the forces seeking passage of the bill. He was supported by various other senators characterized as "captains", each assigned to a separate title of the bill. Senator Magnuson was a captain to whom Title II was assigned. Cong. Rec., 6308 (March 30, 1964).

As a part of his formal opening speech in favor of H. R. 5172, Senator Humphrey offered in support of his argument on constitutionality of Title II the legal opinion of some 22 eminent lawyers from whom he had requested an opinion. Since their opinion was relied upon by Senator Humphrey and since the opinion necessarily was based upon the writers' conception of the application and effect of Title II, what was said in that opinion may appropriately be examined in discerning a congressional intent with respect to the claimed finding. The opinion was fully adopted and approved by Senator Humphrey and the other principal managers of the bill in the Senate.

The opinion dated March 30, 1964, addressed to Senators Humphrey and Kuchel, is signed by Messrs. Harrison Tweed and Bernard G. Segal and joined in by 20 other eminent lawyers. It states:

> With respect to title II, the congressional authority for its enactment is expressly stated in the bill, to rest on the commerce clause of the Constitution and on the 14th amendment. The reliance upon both these powers to accomplish the stated purpose of title II is sound. Discriminatory practices, though free from any State compulsion, support, or encouragement, **may** so burden the channels of interstate commerce as to justify legally, congressional regulation under the commerce clause. On the other hand, conduct having an insufficient bearing on interstate commerce to warrant action under the commerce clause may be regulated by the Congress where the conduct is so attributable to the State as to come within the concept of State action under the 14th Amendment. Cong. Rec. 6832 (April 7, 1964). (Emphasis supplied.)

It is submitted that the above language clearly contemplates that discriminatory practices "may", in an in-

dividual case, sufficiently burden commerce to justify congressional regulation under the commerce clause but that on the other hand, it "may" not. Appellees have previously taken the position that the inclusion of a 14th Amendment aspect by use of the "state action" test in and of itself indicates that no overall congressional finding of an aggregate commercial effect was made. The above language confirms this. The ultimate question is what the **Congress** intended with respect to any such finding. With the explanation of the Act made by Senator Humphrey and the other captains supporting him and with the above legal opinion before them, it can hardly be stated that the members of the Senate were even conscious of any finding of the type imagined by appellants.

Senator Magnuson made a lengthy address on the floor of the Senate specifically as to Title II. His role as self-described was to expand inquiry as to the constitutionality, wisdom, intent and effect of Title II. Cong. Rec. 7169 (April 9, 1964). One of the reasons for doing this, he said, was to build a legislative history to aid the courts, *ibid.* At the beginning of his remarks, he informed the Senate that the provisions of Title II in H. R. 7152 were "very substantially like that" considered by the Committee on Commerce, *ibid.* So saying, he announced that he would "draw upon the facts, convictions and ideas developed in the course of those hearings in discussing the need for such legislation, the power of Congress to act in this field, and the intended application of the terms of this bill." *Ibid.*

Thus, he started by equating the "intended application" of H. R. 1752 to the Senate bill which, as we have shown, did not include a food test for restaurants. In his remarks, he listed what he referred to as "serious economic burdens, resulting from discriminatory practices in establishments dealing with the general public." His enumeration of "burdens" was largely patterned on the proposed find-

ings contained in S. 1731. Again, there was no mention of a determination that discrimination in restaurants serving food which has crossed state lines is a burden upon interstate commerce. The burdens referred to by Senator Magnuson might have supported the interstate traveler test or the entire application of the statute to motels and hotels, but it in no way even purported to apply to restaurants on the basis of a food test. Cong. Rec. 7173 (April 9, 1964).

Finally, in his section by-section analysis of the present statute, Senator Magnuson, after noting that Section 201 (b) defines certain establishments as places of public accommodations "if their operations affect commerce," explained Section 201 (c) as follows:

> Section 201 (c) provides **the criteria for determining** whether the operations of an establishment affect commerce. Cong. Rec. 7175 (April 9, 1964). (Emphasis supplied.)

Appellees have never contended that Congress did not intend the serving of food which has crossed state lines to be a "criterion" for determining an effect on commerce. Indeed, they have at all times objected to that means on the grounds that the criterion thus legislated was a conclusive presumption of the specific fact that alone could give Congress power over the particular establishment. Certainly Senator Magnuson's remarks are not consistent with a congressional declaration in the terms of, or even resembling the finding claimed by appellants.

The legislative history of this statute is voluminous. While we have not counted the pages of the Congressional Record in 1963 and 1964 which are devoted to the civil rights proposals that finally emerged as the present statute, it is safe to say that they number in the thousands. It is indeed strange that throughout those thousands of pages there is not, so far as appellees can find, a single word of testimony relating to the specific finding claimed

by appellants, i. e., that discrimination in restaurants serving food which has crossed state lines has a substantial and close effect on interstate commerce. On the other hand, the legislative history is replete with references to National Labor Relations Board cases where it has been determined on an ad hoc basis that a specific labor dispute would affect commerce. The legislative history in this instance is not clear on many things, but to appellees it seems abundantly clear that the members of Congress intended that, insofar as a restaurant was concerned, there must be an actual effect upon commerce determined by the courts. If this be true, then the invalidity of the conclusive presumption as to the food served renders Title II unconstitutional as to appellees.

II. Prior Statutes Provide No Precedent for Title II.

The appellants' brief relies heavily upon prior statutes and prior decisions of the Court which involve the regulation of "intrastate" or "local" activities under the commerce power. Their contention thus appears to be simply that since it has been done before, it can be done here. Our reply is twofold. First, merely because a particular "local" business may be reached by the federal commerce power for one purpose plainly does not demonstrate that even the same business may be reached for other purposes and in regard to other activities. Secondly, an analysis of past legislation and decisions involving the commerce power demonstrates that the present statute, insofar as it applies to appellees by virtue of the anterior movement of food through commerce, departs markedly from any prior statute sustained as an exercise of the commerce power.

It has been said that no commerce-power legislation regulating activities "local" in nature has been sustained by this court unless those local activities are in commerce, are found to affect commerce, or are so commingled with activities in interstate commerce that their regulation is

necessary to achieve the regulation of those interstate. See both the court's opinion and the dissenting opinion in **United States v. Five Gambling Devices**, 346 U. S. 411, 446-48; 460. So far as we are able to determine, this still holds true. Title II of the present statute, insofar as pertinent here, is incapable of being regarded as within the scope of any of the other statutes or decisions. For the purpose of so showing, and for the subsidiary purpose of showing the existence of factual determinations of an "effect" on commerce by the regulated activity where such effect was the source of the commerce power, we shall attempt to review those prior statutes and decisions.

1. **Statutes Regulating Goods or Activities "In Commerce."**

Statutes of this sort include, of course, the regulation of the actual movement of particular articles and persons between the states as well as the instrumentalities by which that movement is effectuated. And due to the local orientation of our society until relatively recent years, this was the chief area in which the commerce power needed to be exercised. This, of course, is the most elemental use of the commerce power, for it comes within the express terms of the constitutional grant. And since it does, there is no need of a finding of the existence of an effect on commerce or other auxiliary source of power.

(a) **Statutes Regulating the Movement of Goods in Commerce.** Statutes of this character regulate the actual movement of articles and persons across state lines (including whether they may be moved at all and, corollarially, the conditions upon which they may be moved). In the main, such regulations are directed at **specific** articles or specific practices in respect to articles (or persons) which Congress deems deleterious in and of themselves. Just as the states for similar reasons may outlaw them locally, so can Congress deny them the use

of the channels of interstate commerce through its "power to keep the channels of such commerce free from the transportation of illicit or harmful articles." **McDermott v. Wisconsin**, 228 U. S. 115, 128. (with regard to the Food & Drug Act of 1906, 34 Stat. 768). Such statutes therefore purport to regulate personal conduct only insofar as the conduct relates specifically to an article which moves or is intended for movement in commerce. Their application is expressly limited accordingly. Thus, the act regulating traffic in lottery tickets requires that they be "carried in interstate or foreign commerce" (18 U. S. C., § 1301); the Mann Act applies only to one who "transports in interstate . . . commerce . . . any woman" or who "obtains any ticket" for such transportation (18 U. S. C., § 2421); stolen property must be transported in or be a part of interstate commerce (18 U. S. C., §§ 2312-2317); the Gambling Devices Act requires transportation of the device "to any place in a state . . . from any place outside of such state" (15 U. S. C., § 1172); the Kidnapping Act requires transportation of the person "in interstate commerce" (18 U. S. C., § 1201); the Fur Products Labeling Act and the Textile Fiber Products Act apply only to such products introduced or manufactured for introduction into or sold in commerce between states (15 U. S. C., § 69; 15 U. S. C., § 70); the Fair Labor Standards Act applies only to an employee "who is engaged in commerce or in the production of goods for commerce" (29 U. S. C., §§ 206, 207); the Federal Food, Drug and Cosmetic Act applies only to such articles as are introduced or received in interstate commerce (21 U. S. C., § 331); and the Ashurst-Summers Act (49 Stat. 494) applied only to prison-made goods to be shipped or transported in interstate . . . commerce," see **Kentucky Whip & Collar Co. v. Illinois Cent. R. R.**, 299 U. S. 334.

True, some of these statutes and others like them reach "local" conduct at either extremity of the injurious article's interstate journey. Thus, the Mann Act proscribes

the purchase of tickets for the prohibited transportation; the Fur Products Labeling Act reaches the manufacture and sale of the article which will be or has been shipped interstate (15 U. S. C., § 692); the Food, Drug and Cosmetic Act reaches acts resulting in misbranding of the articles done subsequent to the interstate movement and before their sale to the ultimate consumer (21 U. S. C., § 331(k)); and the Fair Labor Standards Act of 1938 regulates the wages and hours of employees engaged in the manufacture of articles destined for shipment in interstate commerce (29 U. S. C., §§ 206, 207). But in all such cases the regulated activity must be directly related to the articles which are intended for or have moved in interstate commerce. Congress having deemed the article or its movement injurious it can, by virtue of its power to exclude it altogether, restrict its movement except on prescribed conditions. The power is over the particular article, not the "local" activity itself. Thus, it was said of the convict-goods act, "as the Congress could prohibit the interstate transportation of convict-made goods . . . the Congress could require packages containing convict-made goods to be labeled . . . ."[4]; of the Fair Labor Standards Act, "The obvious purpose of the act was not only to prevent the interstate transportation of the **proscribed product**, but to stop the initial step toward transportation, production with the purpose of so transporting it"[5]; of the Food, Drug and Cosmetic Act, "Congress may determine . . . the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure."[6]

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[4] *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 299 U. S. 334, 352-53.

[5] *United States v. Darby*, 312 U. S. 110, 117 (emphasis added), and see *Roland Elec. Co. v. Walling*, 326 U. S. 657, 669.

[6] *McDermott v. Wisconsin*, 228 U. S. 115, 135. And see *United States v. Sullivan*, 332 U. S. 689, 696.

Contrastingly, Congress has not in Title II sought to restrict the interstate movement of food; it did not and could not regard food or its movement injurious; and the proscribed "local" activities have no connection, either logically or on the face of the statute, with the article which has moved in commerce.

(b) **Statutes Regulating Instrumentalities of Commerce.** The other principal area of federal commerce clause regulation of acts shown to be in commerce is, that over instrumentalities of interstate commerce. Like those regulating specific articles or their movement, these statutes in the main are by their terms applicable only to instrumentalities actually engaged in interstate commerce. Thus, the Interstate Commerce Act is limited to "common carriers engaged in the transportation . . . [of commodities or persons] from one state . . . to any other state," (49 U. S. C., § 1); the Railway Labor Act is limited to a "carrier" which is "subject to the Interstate Commerce Act," (45 U. S. C., § 157, First); the Hours of Service Act of 1907 regulates "common carriers, their officers, agents and employees, engaged in the transportation of passengers or property . . . from one state . . . to any other state," (45 U. S. C., §§ 61-64); the act regulating bills of lading applies to bills of lading "issued . . . for the transportation of goods . . . from a place in one state to a place in another state" (49 U. S. C., § 81); and the Employers' Liability Act of 1908 applies only to a "common carrier by railroad while engaging in commerce between any of the several states," and to injury to an employee "while he is employed by such carrier in such commerce" (45 U. S. C., § 51).

The primary design and purpose of the above statutes and others like them thus is to embrace chiefly articles or activities in interstate commerce. Insofar as pertinent here, Title II in design and purpose embraces purely local activities only.

2. Statutes Extending Interstate Regulation to Commingled Intrastate Activities.

When Congress has undertaken to regulate predominantly interstate traffic and activities, as in statutes of the above sort, it often has been necessary to extend the reach of a particular regulation to include **also** "intrastate" activities or commodities. This has been done only where the "local" activities are so intermingled with the interstate that separation is impractical or impossible, and their regulation therefore, is necessary to make the interstate regulation effective. Moreover, in many such instances the interrelationship, either physically or economically, between the "intrastate" and the "interstate" has been so close that practically and rationally both are actually "in commerce," and the decisions have so considered them. This essentially has been the basis for the extension of interstate regulation to otherwise "local" activities in three principal types of regulatory statutes: (1) those regulating instrumentalities of interstate commerce; (2) those establishing economic regulation of particular commodities produced for and sold in interstate commerce; and (3) those prohibiting or regulating interstate traffic of particular articles having dangerous or otherwise deleterious propensities. Some examples, not intended to be exhaustive, of statutes having "local" application in this context are set out below.

(a) **Statutes Regulating "Local" Activities in Association With Control of Interstate Instrumentalities.** A railroad or other instrumentality of commerce which is engaged in **both** interstate and intrastate commerce has been subjected to federal regulation in respect to "intrastate" matters when they cannot practically be separated from interstate activities for purposes of regulation. This was the basis for applying the Safety Appliance Act, 45 U. S. C., §§ 1-16, to trains moving intrastate over the line

of an interstate carrier, in **Southern Ry. v. United States,** 222 U. S. 20; the Hours of Service Act, 45 U. S. C., § 61, to employees whose duties included both dealing with trains moving in interstate and those moving in intrastate commerce, in **Baltimore & O. R. R. v. I. C. C.,** 221 U. S. 612; the Railway Labor Act, 45 U. S. C., §§ 151 et seq., to an interstate carrier's "back shop" employees working on equipment used in the carrier's transportation service, 97% of which was interstate, in **Virginian Ry. v. System Federation No. 40,** 300 U. S. 515, 554-57; the Employers' Liability Act of 1908, 45 U. S. C., § 51, to an injury to the interstate employee of an interstate carrier although the injury is caused by an intrastate employee, in **Second Employers' Liability Cases,** 223 U. S. 48. The same consideration was paramount in applying the Interstate Commerce Act, 49 U. S. C., § 1 et seq., in **Shreveport Rate Case,** 234 U. S. 342, 353, to the intrastate rates of an interstate carrier which discriminated against the carrier's interstate traffic and consequently injuriously affected interstate commerce, since federal regulation can be employed to "prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operation to the injury of interstate commerce." In that case, the adverse effect upon commerce was found judicially. *Id.*, 234 U. S. at 346. Thus, in each of these statutes "intrastate" activities were reached only when the carrier was engaged in interstate commerce and when the intrastate activities were inextricably bound to those obviously interstate.

(b) **Statutes in Which "Local" Activities Are Reached in Association With Economic Regulation of Interstate Commodities.** Statutes of this sort regulate specific commodities, or their sale and movement, in interstate commerce. Therefore, the principal thrust in each is the control of activities purely interstate, and the statutory language is drawn accordingly to reach primarily those

transactions which are in commerce. Thus, they basically are economic regulations of activities in interstate commerce. In their application it is recognized that in order to achieve the major objective of the statute—control of the movement of the regulated commodity in interstate commerce—it sometimes is necessary to extend the control to goods which themselves do not actually move interstate. In every instance, however, the extension of regulation to the "local" activities is predicated upon the fact that those activities are so interwoven either physically or economically with the interstate flow that to treat them separately would be impossible practically and would impair or destroy the effectiveness of the regulation of interstate activities. Indeed, in most cases where this has been done the "local" activity as a practical matter was but a part of the interstate flow of the regulated commodity. In each instance control of "intrastate" matters was merely a necessary incident of effective control over interstate elements to which the statute was primarily directed.

Statutes and decisions in which "intrastate" affairs have been subjected to regulation on this basis include the Grain Futures Act of 1922, 42 Stat. 998, **Board of Trade v. Olsen**, 262 U. S. 1; the Agricultural Marketing Agreement Act of 1937, 7 U. S. C., § 608c, **United States v. Wrightwood Dairy Co.**, 315 U. S. 110; the Tobacco Inspection Act, 7 U. S. C., § 511a; **Currin v. Wallace**, 306 U. S. 1; the Agricultural Adjustment Act of 1938, 7 U. S. C., §§ 1281 et seq., **Mulford v. Smith**, 307 U. S. 38, **Wickard v. Filburn**, 307 U. S. 111; and the Fair Labor Standards Act of 1938, 29 U. S. C., §§ 201 et seq., **United States v. Darby**, 312 U. S. 100.

The Grain Futures Act of 1922 regulated transactions in grain futures at the Chicago Board of Trade, the intermediary through which grain moving on through bills of lading from other states through Chicago to destina-

tions outside of Illinois was sold; thus, the statute applied only to transactions in commodities in actual interstate transit. Not only were the regulated activities "such an incident of that [interstate] commerce, and so intermingled with it," **Board of Trade v. Olsen**, 262 U. S. 36, but indeed, like the activities regulated in the Stockyards & Packers Act of 1921, and **Stafford v. Wallace**, 258 U. S. 495, they "cannot be separated from the [interstate] movement to which they contribute, and necessarily take on its character." *Id.*, 262 U. S. at 35. And, although the regulated activities thus were "in" commerce, quite detailed statutory findings of their effect upon the interstate movement of the commodity nevertheless were made by Congress and relied upon by the court. *Id.*, 262 U. S. at 4-5, 10-15, 37.

Similarly, the Tobacco Inspection Act of 1935, which likewise was directed at a single, predominantly interstate commodity in providing for inspection and grading of leaf tobacco at auction warehouses, was chiefly the regulation of "sales in interstate or foreign commerce . . . subject to congressional regulation." **Currin v. Wallace**, 306 U. S. at 10. Consequently, the basis for extending the regulation in respect to some intrastate sales was simply because "[t]he fact that intrastate and interstate sales are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care," citing **Shreveport Rate Case**, supra. *Id.*, 306 U. S. at 11.

The Agricultural Adjustment Act of 1938, and **Mulford v. Smith**, 307 U. S. 38, presented the same situation, where the dominant aim and impact of the economically directed legislation was in respect to commodities moving in interstate commerce—which "constitutes interstate commerce", *Id.*, 307 U. S. at 48—and locally destined tobacco was subjected to regulation only insofar as it was so inter-

mingled physically with that sold interstate that "[r]egulation, to be effective, must, and therefore may constitutionally, apply to all sales." Id., 307 U. S. at 47. Similarly, in **Wickard v. Filburn**, 317 U. S. 111, the local disposition of wheat was so commingled economically with the interstate movement of the commodity that its regulation too was necessary to effectuate the major economic purpose of control over the interstate movement.[7] The Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 608c, which was directed at regulation of the price of milk moving in interstate commerce, could regulate also the price of intrastate milk found to directly affect interstate commerce in milk since the "national power to regulate the price of milk moving interstate . . . extends to such control over intrastate transaction as is necessary and appropriate to make the regulation of the interstate commerce effective." **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, 121. And the Fair Labor Standards Act may be applied to employees engaged in producing both interstate and intrastate goods. **United States v. Darby**, 312 U. S. 100, 118.[8] For the same reason, federal control of interstate sales of colored oleomargarine was extended by amendment in 1950 (64 Stat. 20, 21 U. S. C., § 347) to intrastate sales precisely because "[t]he regulation of the whole is necessary in order to provide effective regulation of that part which originates from outside the state of consumption."[9]

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7 "[A] factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions . . . [and] if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Wickard v. Filburn*, 317 U. S. at 138, 139.

8 "[I]t would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce". *United States v. Darby*, 312 U. S. 100, 118.

9 Senate Report No. 308, 81st Cong., 2nd Sess.; 1950 U. S. Code, Cong. News, at 1973.

Since in each of the above statutes the subject of the regulation was predominantly activities and commodities actually in interstate commerce, a legislative finding of its effect on commerce would seem unnecessary. Yet each contains such a statutory finding.[19] And in some, as the milk price control statute involved in **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, it was required additionally that the effect be determined in administrative proceedings subject to judicial review. *Id.*, 315 U. S. at 116.

With respect to the Fair Labor Standards Act in its application to employees not "engaged" in but producing goods for commerce, it has been already noted that (1) it was an exercise of the power to prevent the introduction of the goods into interstate commerce and applied only to activities directly connected with the preparation of those goods for commerce, and (2) it applied to "local" activities only if there is a physical mingling of work on interstate and intrastate articles. Unlike Title II, which like anti-trust and labor legislation is directed at the **activities** themselves which might affect the flow of commerce generally, the Fair Labor Standards Act points to the **goods** themselves. There, the commerce power was invoked on and derived from that basis. Accordingly, the volume of interstate movement and the effect on commerce in general is not important; an employee might be covered if one or two per cent of the articles he has worked on move interstate. Pointing up this distinction further is the fact that the Fair Labor Standards Act is based upon the **future** movement of the particular article worked on; consequently, an employee can be covered one week and not the next.

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[19] Tobacco Inspection Act, 7 U. S. C., § 511a; Agricultural Adjustment Act, 7 U. S. C., § 1311, 7 U. S. C., § 1331; Agricultural Marketing Agreement Act, 7 U. S. C., § 601; Fair Labor Standards Act, 29 U. S. C., § 202; colored oleomargarine act, 21 U. S. C., § 347a.

(c) **Statutes in Which Control of Local Activities Is Necessary to the Effective Control of the Interstate Movement of Harmful Articles.** The other area in which "local" activities have been subjected to regulation is in statutes in which Congress has undertaken the control or prohibition of movement in interstate commerce of particular articles of injurious character and it has been necessary to extend the control to local activities connected with that particular article's movement or use in order to make the interstate control effective. Examples of this type of "local" regulation are the Food, Drug and Cosmetic Act, 21 U. S. C., § 331 (k), **U. S. v. Sullivan**, 332 U. S. 689, and the regulation of interstate bills of lading, 49 U. S. C., § 121, **United States v. Ferger**, 256 U. S. 205. See also the dissenting opinion of Mr. Justice Clark in **United States v. Five Gambling Devices**, 346 U. S. 441, 460-463, regarding the power to require manufacturers of gambling devices to report both interstate and intrastate sales in order to effectively control those made interstate.

Thus, in **United States v. Ferger**, supra, the power to prohibit fictitious or forged bills of lading under which no goods actually moved interstate was sustained because it was necessary to the effective regulation of interstate bills of lading and therefore in aid of Congress' primary power over an instrumentality of commerce.

In **United States v. Sullivan**, supra, it was held that Congress' power to regulate for the ultimate consumer's protection the labeling of drugs moving across state lines could be applied to acts resulting in their mislabeling done while the drugs were held for sale to the public by a retail druggist who had purchased them from the interstate consignee. Under that statute, the Food, Drug and Cosmetic Act, 21 U. S. C. § 331, the potentially injurious character of the article itself was the subject of the regulation. Consequently, the effectiveness of Congress' obvious power over its interstate movement would

have been entirely thwarted if the control over its labeling had not been extended to the ultimate purchaser. The fact of its movement to the retail druggist was not the source of any congressional power except in respect to the labeling of that particular article.[11] Those statutes and decisions therefore afford no analogy to what Title II attempts to do. Thus, an application of the food-test concept of commerce power to the facts in the **Sullivan** case would achieve the remarkable result that Mr. Sullivan's drug store, because of his purchase of several bottles of sulfathiazole which previously had moved in commerce, could be regulated in any manner whatever irrespective of a lack of connection with the injurious quality of the drug. Congress could prescribe the seating capacity of his establishment, the magazines he could sell, the minimum age of customers he could serve. And since the government's position is that mere receipt at some point after movement in commerce in itself was the source of power in **Sullivan**, the power to regulate in general the activities of the ultimate consumer would be established as well. It may be said that such regulation might not be reasonable, but appellants have urged **Sullivan** and **Mandel** as authority for the existence of Congress' **power** to regulate, not for the reasonableness of its exercise.

Similarly, in oral argument, the Solicitor General, in response to a question by the Court, agreed substantially that Congress could make it a federal offense to hit one's wife with a baseball bat because the bat had moved in commerce. The government necessarily assumed that position because under Title II's food-movement test the movement of food is tied not to the proscribed activity but to the operation generally of restaurants,[7] and even

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[11] See also *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U. S. 385, 391, which on the same grounds held the requirements of the Fur Products Labeling Act, 15 U. S. C., § 69, could be applied to fur in the hands of a retailer after interstate shipment.

the operations of a restaurant might or might not in a given case actually affect commerce. To bring that illustration within the context of the Sullivan decision, assume Congress finds that narrow-handled baseball bats are injurious to the public and, therefore, prescribes a minimum diameter for bats moving in commerce. To effectuate this law Congress could prohibit a person from whittling the handle of a bat which had moved in commerce. That would be the **Sullivan** case. But could Congress also prohibit this person from hitting his wife with the bat? Or, more in accord with the food-movement test of Title II, could the government regulate the recipient of the bat in conduct which intrinsically is unconnected with the bat? This underscores the weakness of the appellants' reliance upon dissimilar prior statutes and decisions in which "local" activities have been reached under the commerce power; for, the fact that they have been reached as to some activities plainly does not establish that they may be similarly reached as to others.

More generally, Title II, insofar as it applies to appellees, is unlike any of the statutes in which "intrastate" activities have been reached because they are commingled with those interstate activities or movement to which the regulation is principally directed. Other than those regulating instrumentalities engaged in commerce, all of those statutes significantly were regulations of the interstate movement of a particular commodity or of particular goods. The articles or commodities themselves were the subject of regulation. Only those local activities which were intrinsically a part of the interstate movement of the commodity or articles were regulated—not activities which only affected the interstate flow of goods in general. Local activities thus were reached only in association with the broader scheme to regulate activities actually in commerce, and then only when the control of the interstate elements would be defeated without

regulation of the local. In each of the statutes establishing broad economic regulation of a commodity or articles, Congress made specific legislative findings of the impact of the regulated activities upon the interstate movement of the commodity; and where purely intrastate commodities were expressly made subject to regulation, as was local milk in the Agricultural Marketing Agreement Act and **United States v. Wrightwood Dairy Co.**, 315 U. S. 110, provision has been made also for determination in individual cases of an effect on the interstate movement of that commodity. Title II, on the other hand, regulates **only** local activities which have no intrinsic connection with interstate commerce other than their possible effect upon the general flow of goods. The Act is **not** directed predominately at interstate activities of which the local activity is but an incidental aspect; the regulation of the local activity is the sole object of the statute. The Act is not an economic regulation of a commodity or the regulation of deleterious articles, but a regulation of activities in and of themselves. Consequently, the only statutes and decisions which bear any similarity to the Act are those such as the Sherman Act and the National Labor Relations Act which also reach isolated intrastate activities but only upon a determination of their effect upon the general flow of commerce.

3. Statutes Regulating Local Activities When Found on an Ad Hoc Basis to Affect Commerce.

Although there are other statutes[12] in which the power to regulate local activities is acquired on the basis of an

[12] For example, the Agricultural Marketing Agreement Act, 21 U. S. C., § 608C; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; and the Interstate Commerce Act, 49 U. S. C., § 13 (4); *North Carolina v. United States*, 325 U. S. 507, 511; *King v. United States*, 344 U. S. 254, 267-76; *Shreveport Rate Case*, 234 U. S. 342, 357-59, in each of which an administrative finding of an effect on commerce, subject to judicial review, is contemplated.

ad hoc finding of an effect on commerce the primary ones are the National Labor Relations Act, 29 U. S. C., § 151 et seq., and the anti-trust statutes. In these statutes, as in the pertinent part of Title II, the object and impact of the regulation is in respect to activities which might have no connection with interstate commerce other than an effect upon its general flow. Consequently, the power to regulate such activities always has been made dependent upon a determination that the particular activity involved in a particular case will have an effect on commerce.

In appellees' initial brief, particularly at pages 14 through 17, the requirement and practice under the National Labor Relations Act of a case-by-case determination of the effect of a labor dispute or other activity upon the flow of commerce is discussed. It was noted that the required effect must be prospective, evidence of past interstate purchases being only the basis for an inference that there will be like purchases in the future. See, e. g., **N. L. R. B. v. Denver Bldg. and Constr. Trades Council**, 341 U. S. 675, 683-84; **J. L. Brandeis & Sons v. N. L. R. B.**, 142 F. 2d 977, 980 (C. A. 8).

The same determination is a requisite of regulation of "local" conduct under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C., § 1, et. seq. Thus, Section 1 of the Sherman Act, 15 U. S. C., § 1, proscribes only combinations or conspiracies "in restraint of trade or commerce among the several states," and Section 2, 15 U. S. C., § 2, similarly applies only to persons who monopolize "trade or commerce among the several states." A section—one case, **United States v. Employing Plasterers Ass'n.**, 347 U. S. 186, illustrates how the existence of a "restraint" of commerce depends upon a factual inquiry of the effect of an otherwise "local" conspiracy upon interstate commerce in precisely the manner provided in the Labor

Relations Act. The government's complaint in that case alleged that a conspiracy constituting a restraint on 60 per cent of the plastering business in the Chicago area adversely affected the otherwise continuing flow of plastering materials from out-of-state origins to Illinois job sites. Regarding the averments as charging only a "local restraint" not reached by the act, the district court dismissed the complaint. This Court reversed since the government's allegations of the effect on commerce should be "taken into account in deciding whether the government is entitled to have its case tried," id., 347 U. S. at 188, and must necessarily be resolved by a factual determination. For, as Mr. Justice Black observed, id., 347 U. S. at 189:

> [I]t goes too far to say that the government could not possibly produce **enough evidence** to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints **can** produce the effects condemned by the Sherman Act is no longer open to question. [Emphasis added.]

The government's proof would of course be subject to rebuttal by the defendants. In every case in which the unlawful activity is local, a similar determination is required. See, *e.g.*, **United States v. Yellow Cab Co.**, 332 U. S. 218; **United States v. Women's Sportswear Ass'n**, 336 U. S. 460.

The reason for requiring such a case-by-case determination is that therein lies the only source of the government's power over the activity. As was stated by Mr. Justice Stone in **Apex Hosiery Co. v. Leader**, 310 U. S. 469, 485, 498:

> [I]n the application of the Sherman Act . . . it is the nature of the restraint and its effect on interstate

> commerce and not the amount of the commerce which are the tests of violation.
>
> . . . . . .
>
> This court has since repeatedly recognized that the restraints at which the Sherman law is aimed . . . are only those which, **for constitutional reasons,** are confined to transactions in or which affect interstate commerce [Emphasis added].

It follows that where it is determined that the local activity neither is in the course of nor has a demonstrably substantial effect upon trade or commerce between the states, it is not subject to the statute. See, *e. g.*, **United States v. Yellow Cab Co.**, 332 U. S. 218; **Industrial Ass'n v. United States**, 268 U. S. 64. Of course, when the proscribed activity is actually conducted through the channels of interstate and is therefore "in" commerce, it is in no sense a "local" activity, and can accordingly be regulated. See, *e. g.*, **Moore v. Mead's Fine Bread Co.**, 348 U. S. 115 (Robinson-Patman Act, 15 U. S. C., § 13(a) and 13a); **Lorain Journal Co. v. United States**, 342 U. S. 143.

Quite apparently, in view of its use only of the word "affect" in connection with commerce, the food-movement basis of power in Title II was patterned after these decisions under the Labor Relations Act, the Sherman Act, and similar statutes. To do so was necessary, in fact, inasmuch as this portion of Title II, like the Sherman and Labor Relations Acts, seeks to regulate local activities neither in commerce nor associated with regulated interstate activities. Appellants' brief cites many decisions and statutes invoking the commerce power, but there is not one, and we are aware of none, in which an actual ad hoc factual determination of the proscribed activity's effect on commerce was not made or provided for when that effect was the only source of the government's power to regulate. Their brief cites many Labor Board cases and some Sherman Act decisions, but "[d]ecisions under

this type of legislation give the government no support, for no such determination [of the activity's effect on commerce] is required by this Act, and the government asserts no such finding is necessary." **United States v. Five Gambling Devices**, 346 U. S. 441, 447.

In their brief (Br. 55) appellants cite only four cases in support of their position that provision for a judicial or administrative finding of an effect on commerce is unnecessary: **Southern Ry. v. United States**, 222 U. S. 20; **Baltimore and O. R. Co. v. I. C. C.**, 221 U. S. 612; **Wickard v. Filburn**, 317 U. S. 111; and **United States v. Ferger**, 250 U. S. 199. All of these cases were discussed above and, as was shown there, involve statutes under which local activities were reached only because their control was associated and mixed with and necessary to the effectuation of related interstate activities or commodities. Indeed, three of cases, **Southern Ry. v. United States**; **Baltimore & O. R. Co. v. I. C. C.**, and **Ferger**, involved statutes regulating instrumentalities of commerce—the Safety Appliance Act, the Railway Labor Act, and the act regulating interstate bills of lading,[13] respectively. We know of no statute of the type involved in this case in which provision for such a finding on a case-by-case basis has not been made.

Again, at page 49 of their brief, appellants cite six cases for the proposition that legislative findings are unnecessary. Three of those—**Southern Ry. v. United States**; **Baltimore & O. R. Co. v. I. C. C.**, and **United States v. Ferger**—are among those referred to in the preceding paragraph and involve statutes regulating instrumentalities of commerce. Of course power over such instrumentalities is within the express terms of the constitutional grant of the commerce power and findings of an effect on commerce are patently unnecessary. The

[13] Bills of lading for interstate shipments are "instrumentalities" of commerce—*United States v. Ferger*, 250 U. S. at 204.

others—**Virginian Ry. v. System Federation No. 40,** 300 U. S. 515; **United States v. Sullivan,** 332 U. S. 689; and **F. T. C. v. Mandel Bros., Inc.,** 359 U. S. 385—have also been dealt with in this brief and similarly involve statutes regulating activities closely associated with interstate movements. Thus, the statute in **Virginian Ry. v. System Federation** was the Hours of Service Act (railroads), regulating instrumentalities of commerce and made applicable to employees working on both interstate and intrastate equipment. Of course the **Sullivan** and **Mandel** cases both involved statutes regulating the misbranding of articles moving interstate. Similarly, all of the statutes[14] cited in footnote 31 at page 49 of appellants' brief, for their statement that some statutes contain no findings, either regulate instrumentalities of commerce or regulate the character of articles moving interstate. On the other hand, in every instance in which the existence of the commerce power is not apparent upon the face of the statute (as it is in the statutes and decisions cited by appellants) and the activity regulated thus might well be associated from interstate traffic, the factual basis upon which the commerce power exists has been made to appear either by express legislative findings or on an ad hoc basis. As we have noted above, this has been true even where the regulated "local" activity is closely associated with and often a part of regulated interstate activities. For all of the statutes regulating "local" activities in conjunction with control of commodities and their interstate movement have contained such findings.[15]

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[14] Railway Labor Act, 45 U. S. C., § 151; Safety Appliance Acts, 45 U. S. C., § 8, 49 U. S. C., § 26; Bills of Lading Act, 49 U. S. C., § 121; Fur Products Labeling Act, 15 U. S. C., § 69; Automobile Information Disclosure Act, 15 U. S. C., § 1231; Textile Fiber Products Identification Act, 15 U. S. C., § 70.

[15] As in the Grain Futures Act of 1922, 42 Stat. 998; the Tobacco Inspection Act, 7 U. S. C., § 511a; the Fair Labor Standards Act, 29 U. S. C., § 202; and the Colored Oleomargarine statute, 21 U. S. C., § 347a.

And in instances where the local activity is not associated thusly with broader regulation of interstate activities or movement (as here, the Labor Relations Act and the Sherman Act), the statutes have contained not just legislative findings but uniformly a provision for an *ad hoc* determination of the effect of the activity upon commerce; certainly, no such statute has precluded such a determination, as does Title II. Perhaps, then, the explanation for the absence of express legislative findings in older statutes lies in the fact that they mainly regulated only things and activities actually in commerce, and only recently with the expansion and increasing complexity of our nation has it been necessary to use the commerce power in order to regulate "local" activities.[16]

In summary, appellees submit that there is no statutory precedent to support the Solicitor General's position in this case; that his reliance upon the prior statutes men-

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[16] Likewise inapposite are the cases—*U. S. v. Carolene Products Company*, 304 U. S. 144, *Townsend v. Yeomans*, 301 U. S. 441, and others—cited in appellants' brief (Br. 50-53) in support of their contention that, absent express legislative findings, the existence of facts necessary to sustain the constitutionality of a statute will be presumed. In none of those cases was there any question of the legislature's *power* to legislate. The only constitutional inquiry was whether the legislation was a reasonable and necessary exercise of that power. In each instance the power—the legislative jurisdiction—obviously existed. Thus, *Carolene Products* involved the federal Filled Milk Act (21 U. S. C., § 61-63) prohibiting the shipment in interstate commerce of products found to be injurious. That statute, like the Mann Act, the Fur Products Labeling Act and others, thus regulated only articles moving across state lines, over which Congress' power could not be questioned. The only facts presumed were those supporting the legislative "judgment", 304 U. S., at 152, in characterizing the regulated products as "injurious". *Townsend v. Yeomans* involved a state statute regulating commercial transactions within the state. It was enacted under the police power which embraces all persons and activities within the state. The question involved was only whether the statute was so unreasonable that due process was denied. In the present case appellees question the power of Congress. No case of which the appellees are aware has even intimated that the facts upon which this power itself is derived are presumed to exist.

tioned betrays a recognition of the fatal defect in appellant's case. None of the statutes is apposite, yet they define the high water mark of congressional power over local affairs. In Title II, there is no regulation of any article, product, or interstate traffic. The regulation applies only to conduct in isolation from articles or activities directly in commerce. True, it might "affect" commerce indirectly in a particular case as has been recognized in Sherman Act and Labor Board cases, but on the other hand, it might not. Whether it would in a given case, would depend upon the facts as is true under those statutes.

Seemingly Congress recognized this in applying the Act only to restaurants whose operations affect commerce. But it departed from the teaching of the very precedents upon which the appellants rely in legislating a conclusive presumption on the specific ultimate fact which is indispensably required for congressional power.

Again, it is the **power** of Congress under the Constitution with which we are here concerned and "[t]he power to create presumptions is not a means of escape from constitutional restrictions." **Bailey v. Alabama**, 219 U. S. at 239; see **Heiner v. Donnan**, 285 U. S. 312[17] and **Tot v. United States**, 319 U. S. 463.

III. A Mere Hypothetically Rational Basis for the Exercise of Federal Power Is Not Sufficient.

During oral argument, it was contended that in order to hold for the appellees the Court would have to say there was no conceivable rational basis for the legislation. This becomes relevant only if it be assumed for

[17] "[I]f a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantial law." 285 U. S. at 329.

argument (which appellees continue to deny) that Congress made any declaration or finding of the kind urged by the Solicitor General. Appellees insist nevertheless, that such a rule is not in accordance with the Court's historic concept of judicial review.

It must be remembered that we are still talking about the power of Congress and not the wisdom or workability of the legislation. Admittedly when legislation comes within a specific constitutional grant of federal power Congress, like a state legislature acting under the police power, has broad discretion as to the means to be used to correct whatever problem it may be dealing with. But it has never been held that Congress may by legislative fiat merely say that it is acting under granted power and thus foreclose judicial inquiry on the subject.

It is for the Court to say whether there is sufficient basis to conclude that a particular local activity has a sufficiently close and substantial effect on interstate commerce to bring that activity within federal authority in the manner attempted. Unless such judicial review is recognized and exercised, the federal government will become one of unlimited power, rather than one of limited and delegated power as conceived in the constitution.

The Court has never been sterilized so as to limit it in the manner suggested—not where the existence of federal power has been in issue. For example, in holding that Congress exceeded its power under Article I to govern the land and naval forces of the United States by attempting to subject a discharged serviceman and other civilians to Court Martial trials, the Court rejected abundant argument that there was a rational connection between government of the armed service and offenses committed by such persons. **United States ex rel. Toth v. Quarles**, 350 U. S. 11; **Reid v. Covert**, 354 U. S. 1; **Kinsella v. United States ex rel. Singleton**, 361 U. S. 235. In **Toth**, the offense had

been committed while the accused was actually on active duty in the Air Force. Surely such an offense bears a far closer and more substantial connection to the government of the Air Force than the selection of local customers at Ollie's Barbecue bears to interstate commerce in food. Yet the Court struck down the congressional judgment that people like Toth should be subjected to military authority.

Despite vast federal power over war and foreign affairs, the Court has held that Congress exceeded its granted powers in providing for the loss of nationality of a person convicted of wartime desertion. **Trop v. Dulles**, 356 U. S. 86. In doing so, the Court rejected persuasive argument that a rational connection existed between such a measure and the conduct of war and foreign relations. The Court examined the matter for itself (See opinion of Mr. Justice Brennan, 356 U. S. at 105-114).

Neither the Court Martial cases nor the expatriation case were based on any prohibition of the Bill of Rights. They were based on the grounds that Congress had exceeded its Article I authority. The Court exercised its independent judgment in deciding that. That is all the appellees ask of the Court here. Even if it be assumed, for argument, that there was a congressional declaration that the choice of customers in a restaurant has a substantial effect upon interstate commerce, solely and exclusively because a portion of the food served has moved in commerce, can it be said that this Court is limited to the inquiry merely of whether there might conceivably be some remote and hypothetically rational basis for the declaration?

The Courts Martial and expatriation cases also show that the Court's inquiry into "rational basis" is not an aridly logical one. In the case at bar Congress has attempted to move into a field never before subjected to federal control. Section 201 (*c*) (2) controls the persons,

all of whom are local, who may be permitted to gather in an eating place. This is a novel assertion of federal power. It not only impinges upon the right of association of the customers of Ollie's Barbecue, but also upon important rights of the appellees themselves. For this reason, it is appropriate that this Court take an exceedingly close look to see that there is a solid basis for saying that the activities regulated in this statute have a demonstrated substantial and close effect upon commerce. Certainly because of the far-reaching implications of this legislation the Court should take a closer look than, for example, in the case of controlling the supply and demand of wheat. For wheat is a commodity moving daily in the channels of commerce, and it was only to control that movement that the statute upheld in **Wickard v. Filburn**, supra, was enacted. Contrastingly, the impact on commerce resulting from the kind of people who are permitted to gather in local places like appellees' restaurant could be exceedingly thin at most. Certainly it has not been sufficiently demonstrated in this record for the congressional *ipse dixit* to stand.

Furthermore, it is worth at least passing comment to note that in none of the landmark decisions relied upon by appellants has the Court approached its function of judicial review on any such sterile basis as is urged by the Solicitor General, e. g., **Wickard v. Filburn**, 317 U. S. 11; **United States v. Darby**, 312 U. S. 100; **NLRB v. Jones & Laughlin Steel Corp.**, 301 U. S. 1. In each of these cases the Court recognized its function as requiring it to examine the factual basis upon which the exertion of federal commerce power was purportedly based. In each case the Court went to lengths to discover, not on the basis of some hypothetical rationality that **might** have existed, but on the basis of substantial and genuine facts shown in the record, that Congress has permissibly concluded that the regulation was necessary to remove a

burden upon commerce. The Court did not imagine a state of facts, not made know to it, that would support the legislative actions. Those statutes were upheld on the basis of a demonstrated factual situation in the light of which Congress was entitled to conclude that the local activities involved should be regulated for the protection of commerce.

The record in this case fails to show even the barest basis for an exercise of commerce clause power as against these appellees.

CONCLUSION.

The position urged by appellees in this case does not require the Court to be insensible to current affairs. Inevitably, there is here a conflict between the concept of human equality and individual rights under the Constitution. Very early in the history of our republic in **Marbury v. Madison,** 1 Cranch. 137, ..., Chief Justice Marshall stated:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of [*177 equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it" [1 Cranch. at 176-77].

Appellant's case is founded on a concept of the interstate commerce clause which has never been recognized by the Courts. While the wisdom of legislation is a matter for

the Congress it is within the Court's proper prerogative to look with deep concern at an assertion of power never heretofore upheld.

We have undertaken in our briefs in this case and in oral argument to demonstrate that Title II, insofar as the food test relating to restaurants is concerned, would apply to local activities having no demonstrable effect upon interstate commerce. While the injury that would be done the appellees has been shown to be substantial, it is with the deeper and broader implications of the rationale necessarily assumed by the Solicitor General that appellees are most concerned. No social problem is so great as to justify erosion of constitutional liberties.

Appellees recognize that because of the almost unprecedented haste with which this case has been presented to the Court and because of the unusually important constitutional issues involved, there may be points upon which the Court will desire further briefs or further argument. Appellees will welcome the opportunity of presenting either or both.

Respectfully submitted,

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APPENDIX A.

Title II—Injunctive Relief Against Discrimination in Public Accommodations.

Findings.

SEC. 201. (a) The American people have become increasingly mobile during the last generation, and millions of American citizens travel each year from State to State by rail, air, bus, automobile, and other means. A substantial number of such travelers are members of minority racial and religious groups. These citizens, particularly Negroes, are subjected in many places to discrimination and segregation, and they are frequently unable to obtain the goods and services available to other interstate travelers.

(b) Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate lodging accommodations during their travels, with the result that they may be compelled to stay at hotels or motels of poor and inferior quality, travel great distances from their normal routes to find adequate accommodations, or make detailed arrangements for lodging far in advance of scheduled interstate travel.

(c) Negroes and members of other minority groups who travel interstate are frequently unable to obtain food service at convenient places along their routes, with the result that many are dissuaded from traveling interstate, while others must travel considerable distances from their intended routes in order to obtain adequate food service.

(d) Goods, services, and persons in the amusement and entertainment industries commonly move in interstate commerce, and the entire American people benefit from the

increased cultural and recreational opportunities afforded thereby. Practices of audience discrimination and segregation artificially restrict the number of persons to whom the interstate amusement and entertainment industries may offer their goods and services. The burdens imposed on interstate commerce by such practices and the obstructions to the free flow of commerce which result therefrom are serious and substantial.

(e) Retail establishments in all States of the Union purchase a wide variety and a large volume of goods from business concerns located in other States and in foreign nations. Discriminatory practices in such establishments, which in some instances have led to the withholding of patronage by those affected by such practices, inhibit and restrict the normal distribution of goods in the interstate market.

(f) Fraternal, religious, scientific, and other organizations engaged in interstate operations are frequently dissuaded from holding conventions in cities which they would otherwise select because the public facilities in such cities are either not open to all members of racial or religious minority groups or are available only on a segregated basis.

(g) Business organizations are frequently hampered in obtaining the services of skilled workers and persons in the professions who are likely to encounter discrimination based on race, creed, color, or national origin in restaurants, retail stores, and places of amusement in the area where their services are needed. Business organizations which seek to avoid subjecting their employees to such discrimination and to avoid the strife resulting therefrom are restricted in the choice of location for their offices and plants. Such discrimination thus reduces the mobility of the national labor force and prevents the most effective

allocation of national resources, including the interstate movement of industries, particularly in some of the areas of the Nation most in need of industrial and commercial expansion and development.

(h) The discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers. Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the States and therefore fall within the ambit of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

(i) The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the fourteenth amendment and the commerce clause of the Constitution of the United States to prohibit discrimination based on race, color, religion, or national origin in certain public establishments.

Right to Nondiscrimination in Place of Public Accommodation.

Sec. 202. (a) All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the following public establishments:

(1) any hotel, motel, or other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce;

(2) any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce; and

(3) any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if—

(i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers,

(ii) a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce,

(iii) the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, or

(iv) such place or establishment is an integral part of an establishment included under this subsection.

For the purpose of this subsection, the term "integral part" means physically located on the premises occupied by an establishment, or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons

or business entities which own, operate or control an establishment.

(b) The provisions of this title shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (a).